Appendix A

IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

JIMMIE URBANO LUCERO, Appellant

NO. AP-75,247

v.

THE STATE OF TEXAS

ON DIRECT APPEAL
FROM CAUSE NO. 48593-C FROM
THE 251ST DISTRICT COURT
POTTER COUNTY

HERVEY, J., delivered the opinion of the Court in which KELLER, P.J., MEYERS, WOMACK, KEASLER, HOLCOMB and COCHRAN, JJ., joined. PRICE and JOHNSON, JJ, concurred.

OPINION

Appellant was convicted on May 23, 2005, of murdering three of his neighbors during the same

criminal transaction. TEX. PEN. CODE ANN., §19.03(a)(7)(A).[1] Pursuant to the jury's answers to the special issues set forth in TEX. CODE CRIM. PROC., Article 37.071, §§2(b) and 2(e), the trial judge sentenced appellant to death. Finding no merit in any of the seven points of error raised by appellant in this direct appeal, we affirm.

Points of error one and two relate to a juror misconduct claim that appellant raised in a motion for new trial. Appellant asserts in point of error one that the trial court erred in denying him a hearing on his juror misconduct claim.[2] He asserts in point of error two that the jury committed misconduct under the United States Constitution when it considered Biblical scripture during the punishment-phase deliberations.[3]

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[1] On the morning of September 6, 2003, the 45-year old appellant entered his neighbor's property and murdered three members of the Robledo family with a shotgun. Pedro Robledo, his wife, Manuela Robledo, and their daughter Fabiana Robledo were murdered. Appellant also attempted to murder the Robledo's other two children, Socorro and Guadalupe Robledo, who both testified at trial. Socorro testified that he escaped on foot without injury, and Guadalupe testified that appellant cornered her, Fabiana, and Fabiana's 18-month old son in a bedroom. Appellant shot Guadalupe in the arm and murdered Fabiana after pulling her son from her arms.

[2] **Point of error one**: Did the trial court abuse its discretion and commit reversible error in denying appellant an evidentiary hearing on the issue of scripture reading by the jury foreman during punishment deliberations?

[3] **Point of error two**: Was appellant denied his rights to an impartial jury and punishment determination in violation of

The record reflects that appellant filed new trial motions (an original and an amended motion for new trial). These motions alleged that the jury foreman read Biblical scripture to the jury at the beginning of the punishment-phase deliberations after an initial straw vote showing that two jurors were unwilling to answer the special issues in a way that required appellant to be sentenced to death. These motions alleged:

> After retiring to deliberate on the issue of punishment, the jury foreman conducted an initial straw vote on both of the statutorily mandated special issues which addressed the probability that Defendant would commit criminal acts of violence in the future so as to constitute a continuing threat to society (special issue number 1) and whether there existed sufficient mitigating circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed (special issue number 2). This initial vote revealed a majority of ten jurors who were prepared to vote "yes" to special issue number 1 and "no" to special issue number 2, thus necessitating the

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the Sixth, Eighth, and Fourteenth Amendments to the Unites States Constitution when jurors considered Biblical scripture during its deliberations at the punishment phase of appellant's trial and before it rendered its final verdict?

imposition of the death penalty. The remaining two jurors indicated their unwillingness to vote in such a way in which the death penalty would be imposed. At this juncture, the jury foreman produced his personal Bible and read to all members of the jury scripture from the Bible. This scripture addressed a Christian's duty to obey and consent to the laws of man.[4] It also informed the listeners

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[4] The record reflects that the jury foreman read Romans 13:1-6, from the New Testament of the New International Version of the Bible. Romans 13:1-6, provides:

> [1]Everyone must submit himself to the governing authorities, for there is no authority except that which God has established. The authorities that exist have been established by God. [2]Consequently, he who rebels against the authority is rebelling against what God has instituted, and those who do so will bring judgment on themselves. [3]For rulers hold no terror for those who do right, but for those who do wrong. Do you want to be free from fear of the one in authority? Then do what is right and he will commend you. [4]For he is God's servant to do you good. But if you do wrong, be afraid, for he does not bear the sword for nothing. He is God's servant, an agent of wrath to bring punishment on the wrongdoer. [5]Therefore, it is necessary to submit to the authorities, not only because of possible punishment but also because of conscience. [6]This is also why you pay taxes, for the authorities are God's servants, who give their full time to governing.

that those who opposed authority would experience condemnation.[5]

The content of this scripture had the desired effect of coercing the two dissenting jurors to change their votes in order to insure a unanimous tally on both special issues. Thus, the receipt of the biblical scripture by the jury infringed on each individual juror's duty to base their verdict only on evidence received at trial. This receipt of other evidence was detrimental to Defendant's constitutional guarantee that the verdict at the punishment phase of the trial be truly unanimous, free from coercion and the product of the juror's individualized assessment of evidence lawfully admitted into during (sic) the punishment phase of the trial.

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[5] Appellant claims on appeal that the Biblical scripture read by the foreman "had to do with a Christian's duty and responsibility to carry out the dictates of secular law" which "includes society's and this state's validation of the legality of capital punishment." He further asserts that:

> [T]his extra-judicial code of law requires a mortal's submission to civil law and that includes the imposition of capital punishment. In this regard, reference to Romans 13:1-6 carries with it a high potential of influencing a jury's deliberations on the issue of life or death.

Appellant supported these allegations with an affidavit from one of the jurors (juror No. 7). This affidavit states:

> I served as a juror in the case styled *The State of Texas v. Jimmie Urban Luccro* in the 251st District Court in Potter County, Texas. During jury deliberations at the punishment phase of the trial, I recall that the jury foreman suggested that we take a "straw vote" or a preliminary vote on the two special issues to see where we, as the jury were. The initial vote on both special issues showed 10 jurors were in favor of answering the questions in a way in which the death penalty would be imposed. The remaining two jurors were unwilling to answer those questions in a way in which the death penalty would be imposed. It was at this point in time that the jury foreman took out a Bible which he had with him. He read some scripture from the Bible. This scripture had to do with a Christian's duty to obey, conform and consent to the will and laws of man. This reading of scripture occurred before the final votes were taken by the jury on the two special issues regarding the probability that the Defendant would commit criminal acts of violence in the future and the sufficiency of

> mitigating evidence which would justify a life sentence in place of the death penalty. Although there was not a unanimous vote by the jury as a whole on the two special issues before the reading of the scripture, the vote was unanimous on both special issues some time after the reading of scripture. The foreman of the jury then informed the bailiff and the Court that we had reached a unanimous verdict which called for the death penalty against Jimmie Lucero.

Appellant claimed that the Bible reading by the jury foreman was an improper "outside influence" under TEX. R. EVID. 606(b), which generally prohibits a juror from testifying about jury deliberations for the purpose of impeaching the jury's verdict with an exception to this general rule being that a juror may testify "whether any outside influence was improperly brought to bear upon any juror."[6] Appellant further claimed that it was

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[6] Rule 606 provides:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the jury's deliberations, or to the effect of anything on any juror's mind or emotions or mental processes, as influencing any juror's assent to or dissent from the verdict or indictment. Nor may a juror's affidavit or any statement by a juror concerning any matter about which the juror would be precluded from testifying be admitted in evidence for any of these purposes.

mandatory for the trial court to hold a hearing on his new trial motions so that appellant could "develop the circumstances of the Bible reading and the exact content of the biblical verse read by the foreman to the entire jury."

Appellant also claimed in his new trial motions that he was entitled to a hearing on these motions because "key jurors refuse[d] to discuss the matter with counsel or with any representative of counsel." He further claimed that "[o]nly through compulsory process and sworn testimony from key jurors at a hearing can all relevant facts be developed for this Court's ultimate determination of the merits underlying Defendant's motion." Appellant's counsel filed an affidavit in support of these allegations. The affidavit indicates that only three jurors (Nos. 1, 8, and 12) declined to discuss the case with appellant's counsel. It also specifically states counsel did discuss the case with jurors numbered 2, 3, 4, 5, 6, 7, and 11. No mention is made of juror No. 9 or No. 10. Thus, it appears nine out of twelve jurors did discuss the case with appellant's counsel before he filed his new trial motions supported only by juror No. 7's affidavit.

Relying primarily on civil cases, the State's response asserted that the Bible reading was not an "outside influence" and that appellant was, therefore,

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However, a juror may testify: (1) whether any outside influence was improperly brought to bear upon any juror; or (2) to rebut a claim that the juror was not qualified to serve.

improperly attempting to impeach the jury's verdict under Rule 606(b). *See, Golden Eagle Archery Inc. v. Jackson*, 24 S.W.3d 362, 366-75 (Tex. 2000) (rules contemplate that an "outside influence" originates from sources other than the jurors themselves); *Brandt v. Surber*, 194 S.W. 3d 108, 134 (Tex.App.–Corpus Christi 2006, pet. denied) (a jury's discussion of newspaper articles is not an "outside influence); *Easly v. State*, 163 S.W.3d 839, 842 (Tex.App.–Dallas 2005, no pet.) (a chart brought into jury room with calculations of time appellant would serve in prison after application of the parol laws is not an "outside influence"); *Perry v. Safeco Ins. Co.*, 821 S.W.2d 279, 281 (Tex.App.–Houston [1st Dist.] 1991, writ denied) (juror using dictionary to share a definition with other jurors is not an "outside influence").

It is also imperative to note that the State submitted affidavits from all twelve jurors, all of which indicated that the verdict was not affected by the brief reading of Biblical scripture near the beginning of the hours-long jury deliberations. The two jurors who changed their votes after the preliminary vote unequivocally stated that the reading of the scripture and its content had no effect on their votes on the issues presented to the jury. Juror No. 3 stated:

> When the first vote was taken, I was not ready to vote because I was overwhelmed and too emotional. As a result, I initially voted in a way that a life sentence rather than the death sentence was imposed. The case was

difficult for me, among other reasons, at least because, I, like the defendant, came from a large family, had a brother about the same age of the defendant, and the defendant's mother was near the age of my mother. I wanted to take time, discuss the evidence, think about the trial, and feel clear about my decision ...

After going back into the jury deliberation room during the punishment stage, I recall the juror foreperson read some scripture, saying that he was comforted by the scripture. The foreman said that we may or may not find comfort in the scripture. I do not recall the Chapter and verse of the scripture read. The scripture was not read in a way to force us to agree with it. The jury was not asked to agree with the scripture that was read or to change our decisions based upon its reading ...

The reading of the Bible and the comfort comment probably took less than 2 and ½ minutes out of several hours of deliberations discussing the charged law and the facts. No other scripture was read or discussed ...

I do not believe that the reading of the scripture violated the principles of

> justice. In my opinion, the reading of the scripture did not violate any right of the defendant. The scripture reading was not utilized in a way to bring prejudice against the defendant. Moreover, in the overall scheme of about a two week trial and several hours of deliberations, the above Bible reading was not related to the verdict returned to the court.

The second of the two jurors to change their vote stated:

> When the first vote was taken, I did not vote in a way in which the death penalty was to be assessed. The negative vote was on the first of the two questions the jury had to answer regarding a continuing threat to society. So, I initially voted in a way that a life sentence rather than the death sentence was imposed. After going back into the jury deliberation room during the punishment deliberations and after the first vote, the jury foreperson read some Bible verses. The scripture was not read in a way to force us to agree with it. The jury was not asked to agree with the scripture that was read or to change our decisions based upon its reading or content. I did not feel I was going to be condemned if I did not vote for a

> particular verdict or answer a question in a particular way. . . . I am today comfortable with my votes and individual decision I made during my service on this jury. We followed the court's instructions.
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> The reading of the Bible took probably less than 2 minutes out of several hours of deliberations discussing the charged law and facts . . . . There was no suggestion that the Bible should be consulted on factual issues as opposed to the evidence presented at the trial . . . . In my opinion, based upon the discussions during jury deliberations, our decision was based upon the evidence presented during the course of the trial from the witness stand not on the reading of the scripture. My individual guilt and punishment determinations were based upon the law and evidence presented at trial not the Bible.

All twelve jurors believed that the scripture reading did not violate any right of the defendant and that the defendant received a fair and impartial trial. The juror who read the scripture to the other jurors stated:

> The reading of this scripture was not an attempt on my part to convince any juror to vote in a way that would

> result in the death penalty. I wanted to read scripture because of the seriousness of the decision at hand and to suggest that the man's law as charged in the judge's instructions should be followed. There was no suggestion that the Bible had the answer on the questions regarding whether a life sentence or a death sentence should be imposed. There was no suggestion that the Bible should be consulted as the legal authority contradicting the law of the court's instructions. There was no suggestion that the Bible should be consulted on factual issues as opposed to the evidence presented at the trial.

All twelve jurors indicated that there was no discussion that Biblical principles should be considered or applied in defendant's case. More specifically, Juror No. 7 addressed any misconception that may have been construed from the affidavit previously obtained by appellant's counsel:

> The reading of the Bible and any accompanying comment probably took less than 3 minutes out of several hours of deliberations discussing the charged law and the facts. No other scripture was read or discussed. There was no passage read suggesting that a murderer should be executed under Biblical law. There was no

Bible passage read about the principal of a limb for a limb or an eye for an eye or tooth for a tooth. There was no discussion that such a Biblical principle should be considered or applied in this case to the Defendant, Jimmie Urbano Lucero.

There was no suggestion that the scripture reading was to convince any juror to vote in a way that would result in the death penalty. I do not believe that the reading of the scripture was meant to sway votes one way or the other. There was no suggestion that the Bible had the answer on the questions regarding whether a life sentence or a death sentence should be imposed. There was no suggestion that the Bible should be consulted on factual issues as opposed to the evidence presented at the trial. To my knowledge, the reading of the scripture did not cause anyone to change their vote or to vote in a way that would have resulted in a death penalty being imposed. In my opinion, based upon the discussions during jury deliberations, our decision was based upon the evidence presented during the course of the trial from the witness stand not on the reading of the scripture. From my observations, I think each member of

the jury gave his or her individual guilt and punishment determinations based upon the law and evidence presented at trial. This was certainly true for me.

I do not believe that the reading of the scripture violated the principles of justice. In my opinion, the reading of the scripture did not violate any right of the defendant. The scripture reading was not utilized in a way to bring prejudice against the defendant. I do not believe that there was any adverse judgment or opinion formed regarding the answers to the questions from the reading of the scripture or its content. I do not believe there was an detriment to the defendant caused by the reading of the scripture. I believe that the defendant received a fair and impartial trial. If I did not believe the defendant was accorded a fair trial, I would not be comfortable with my votes and the jury's verdict.

In my earlier affidavit signed through attorney Warren Clark, I did not mean to suggest that there was a connection between the reading of the scripture or its content and any member's ultimate vote in a way where the death penalty was assessed. Moreover, in the

> overall scheme of about a two week trial and several hours of deliberations, in my opinion, the above Bible reading was not related to the verdict returned to the court.

The trial court denied appellant's request for a hearing on his new trial motions. In a letter to the parties announcing its decision, the trial court stated:

> While I recognize that "sometimes trial courts choose to *wisely* make a full record of factual matters in death penalty cases", I believe that such action is contrary to the public policy being promoted by Rule 606(b) of the Texas Rules of Evidence, in that it would subject the jurors to the rigors of direct and cross examination regarding their deliberations. Such public scrutiny of confidential deliberations would discourage open discussion among jurors and could potentially be threatening to the entire jury process.
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> To conduct a hearing simply to make a record, without any expectation that the hearing would result in admissible evidence, does not protect jurors from the inconvenience and potential harassment that such a hearing would impose. Therefore, under the present

circumstances, I do not believe that the Defendant has raised an issue which would require an evidentiary hearing.[7]

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[7] This is consistent with the rationale that has been expressed for the general rule of not permitting a juror to impeach his own verdict. *See State ex. rel. Rosenthal v. Poe*, 98 S.W.3d 194, 202 (Tex. Crim. App. 2003). For example, even in a case where a juror's affidavit indicated that the jury may have "adopted an unjust and arbitrary method" of arriving at its verdict, the United States Supreme Court stated:

> The rule [that a juror cannot impeach his own verdict] is based upon controlling considerations of a public policy which in these cases chooses the lesser of two evils. When the affidavit of a juror, as to the misconduct of himself or the other members of the jury, is made the basis of a motion for a new trial, the court must choose between redressing the injury of the private litigant and inflicting the public injury which would result if jurors were permitted to testify as to what had happened in the jury room.
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> These two conflicting considerations are illustrated in the present case. If the facts were as stated in the affidavit, the jury adopted an arbitrary and unjust method in arriving at their verdict, and the defendant ought to have had relief, if the facts could have been proved by witnesses who were competent to testify in a proceeding to set aside the verdict. But let it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding. Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a

(Emphasis in original).

A defendant is entitled to an evidentiary hearing on his motion for new trial if the motion and accompanying affidavit(s) raise matters not determinable from the record, upon which the accused could be entitled to relief. *Wallace v. State*, 106 S.W.3d 103, 108 (Tex. Crim. App. 2003). We review the trial court's decision under an abuse of discretion standard. *Martinez v. State*, 74 S.W.3d 19, 22 (Tex. Crim. App. 2002).

Appellant claims on appeal that the trial court should have held a hearing on his new trial motions and that the reading of Biblical scripture during the punishment-phase deliberations denied his rights to an impartial jury and punishment determination in violation of the 6th, 8th, and 14th Amendments to the United States Constitution. The State claims that appellant procedurally defaulted these constitutional claims on appeal because he did not raise them in the trial court. The State also claims that the trial court did not abuse its discretion to deny appellant's request for a hearing on his new trial motions, because the matters described in juror No. 7's first affidavit do not constitute an "outside influence" and

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verdict. If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation, the constant subject of public investigation; to the destruction of all frankness and freedom of discussion and conference.

See McDonald v. Pless, 238 U.S. 264, 267-68 (1915).

would, therefore, be excluded by Rule 606(b) at a motion for new trial hearing.[8]

We find it unnecessary to decide whether the jury foreman's Bible reading in this case was an "outside influence," because this record presents no "reasonable grounds" that this Bible reading affected the jury's verdict. *See Wallace v. State*, 106 S.W.3d at 108 (defendant is entitled to hearing on motion for new trial to make a record of matters not determinable from the record if the defendant establishes the existence of "reasonable grounds" showing that the defendant "could be entitled to relief"). The record presented to this Court indicates that this brief reading of Biblical scripture, which was essentially an admonishment to follow man's law (and, therefore, duplicated what was already in the court's charge), occurred near the beginning of jury deliberations. The affidavits clearly indicate that the scripture had no effect on the jury's verdict rendered some hours later.[9] We, therefore, cannot conclude that the trial court abused its discretion in declining to hold a hearing on appellant's new trial motions. For the same reason, any constitutional error that appellant may have preserved as a result

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[8] The State argues that "a juror's affidavit that described matters that did not constitute an 'outside influence' could not be used to support a live hearing on a motion for new trial based on jury misconduct.

[9] The record indicates that jury deliberations began at 12:20 pm and ended at 5:19 pm. The record also indicates that the scripture was read near the beginning of the deliberations, thus the jury deliberated for many hours after the scripture was read and before they rendered a final verdict.

of this Bible reading was harmless beyond a reasonable doubt. Points of error one and two are overruled.[10]

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[10] We also note the Ninth Circuit Court of Appeals' decision in *Fields v. Brown*, a state of California death-penalty case in which the jury foreman made notes "for" and "against" imposition of the death penalty after consulting the Bible and other texts. *See Fields v. Brown*, 503 F.3d 755, 776-82, 780 (9th Cir. 2007). The "for" notes included a reference to Romans 13:1-6, and to other Biblical scripture such as an "eye for an eye" and Exodus 21:12, which states, "He that smiteth a man, so that he dies, shall surely be put to death." *See id.* The jury foreman's "for" and "against" notes were shared with other jurors during punishment deliberations. *See id.*

The defendant presented a "number of juror declarations" to the federal district court in support of his claim that the references to the Bible and other texts during jury deliberations in the state court proceedings constituted jury misconduct. *See id.* The federal district court and the Ninth Circuit analyzed this claim under Federal Rule 606(b), which is more expansive than Texas Rule 606(b), because Federal Rule 606(b) permits jurors to testify "whether extraneous prejudicial information was brought to the jury's attention." *See Fields*, 503 F.3d at 776-83.

The federal district court struck most of the juror declarations as being inadmissible under Federal Rule 606(b). *See Fields*, 503 F.3d at 778. Based on what was left, the federal district court found "that the religious material in the [foreman's] notes was actually received by the jury, was available to it on the second day of deliberations, was discussed by some jurors, was presented at an early state of deliberations before a verdict was reached, and directly related to a material aspect of the case because the references indicated that the death penalty should be imposed in any case involving murder. *See id.* The federal district court concluded that "the jury's consideration of Biblical references offended the principle that

We understand appellant to claim in point of error three that the mitigating evidence instruction "unconstitutionally narrow[ed] the jury's discretion to factors concerning only moral blameworthiness.[11]

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religion may not play a role in the sentencing process, and that it had the potential to be highly prejudicial." *See id.*

In suggesting that the jury could properly consider the foreman's "for" and "against" notes, the Ninth Circuit stated that "the Biblical verses and the other concepts contained in the notes are notions of general currency that inform the moral judgment that capital-case jurors are called upon to make." *See Fields*, 503 F.3d at 780. The Ninth Circuit ultimately decided, however, that the jury foreman's notes were harmless, because they did not have a "substantial and injurious effect" on the jury's verdict. *See Fields*, 503 F.3d at 781-82. The Court stated:

> Whether or not [the jury foreman] should have brought his notes to the jury room and shared them, we cannot say that the Biblical part of the "for" part of the notes had a substantial and injurious effect on the verdict. His own notes had an "against" part as well. So far as we can tell, the communication occurred early on in the deliberations. Jurors could take as much time as they needed to sort through the evidence and reflect on whether the ultimate penalty was the right penalty. More importantly, the jury was instructed to base its decision on the facts and the law as stated by the judge, regardless of whether a juror agreed with it. We presume that jurors follow the instructions.

See id. (Footnote and citations to authority omitted).

[11] "Our understanding of the claim presented in appellant's third point of error is based on appellant's reference in his brief to his amended motion for new trial, which presented this

We have previously rejected this claim. *See Perry v. State*, 158 S.W.3d 438, 449 (Tex. Crim. App. 2005). Point of error three is overruled.

Appellant claims in point of error four that the trial court erroneously overruled his objections to the testimony of Royce Smithee,[12] who provided fact testimony about Texas prison conditions in general and opinion testimony that violence can occur within the Texas prison system.[13] Appellant claims Smithee's testimony was irrelevant under TEX. R. Evid. 401 and, therefore, would not aid the jury in determining a fact in issue under TEX. R. EVID. 702. The trial court ruled that Smithee could testify generally about the operations of the Texas prison

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specific claim to the trial court for the first time. The question appellant presents in point of error three is:

> Does Art. 37.071 sec. 2(f)(4) Code of Criminal Procedure violate the 5th, 6th, 8th and 14th Amendments to the United States Constitution as well as those principles underlying *Tennard v. Dretke*, 542 U.S. 2745, 124 S.Ct. 2562 (2004)?

[12] Smithee is the "chief investigator for the Special Prosecution Unit," which is a "prosecutor assistance program out of the governor's office" with the primary function "to investigate and prosecute, help the DA prosecute, criminal offenses that occur in the prison system and/or on state property."

[13] The question appellant presents in point of error four is:

> Did the trial court abuse its discretion in admitting Smithee's testimony concerning violence in prison and the inner workings of prison when the witness could not and did not opine that the circumstances, facts and events described by Smithee would specifically apply to Appellant in his situation?

system and offer an opinion that violence can occur there.

> [DEFENSE]: Judge, we don't believe that in this particular case–although, obviously we would be disagreeing on different grounds if Mr. Smithee were trying to draw directly to [appellant]. But with regard to this case, what the State's wanting to do is to not get into the actual future dangerousness mode, but try to make an illusion or a suggestion to the jury that because violent acts do occur in prison, that [appellant] is going to commit that.
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> If they cannot individualize and show evidence particular to [appellant's] probability to commit future acts of violence in the future, then the evidence is not relevant.
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> That's what their burden is–and that's what this gentleman will have to prove–showing the prison system is fine unless they're going to try to go into the fact that violence can occur in prison. But he can't give us any handle or any help as to whether or not this particular Defendant would be a violent risk in the future, so we believe it's not relevant under 702 and we would ask the Court to exclude him.

[THE COURT]: The objection as to relevance will be overruled.

Counsel, Mr. Smithee will be allowed to give factual testimony about the operations of the Institutional Division of the Texas Department of Criminal Justice, and I don't believe an opinion is necessary in any area.

[STATE]: I think, Your Honor, as far as opinion goes, the furtherest (sic) that he would be asking Mr. Smithee questions in that regard was if any inmate chose to commit an offense within the prison system, could they within the system as it's set up today, do that if they chose to do so. But we are not going to be applying that directly as to he just begs our question on that.

[DEFENSE]: I don't believe there's any question that an inmate could do that if they wanted to, you know, whether it be with their hands or otherwise. But they're trying to draw a parallel between this Defendant and general suggestions that they're going to say and they just simply can't do that. But they want to try to throw that out in front of the jury, so we believe that again–we're not trying to

> argue with the Court, I apologize, but that it should not be admissible.
>
> [THE COURT]: Okay. The objection will be overruled.
>
> Mr. Smithee will be entitled to give opinion testimony as to whether or not violence can occur within the system, and factual testimony about the operations of the Texas Department of Criminal Justice, Institutional Division, but would prohibit opinion testimony as to probability or any kind of specific percentages.

The record also reflects that, as part of its case at punishment, the defense claimed that "in an incarcerated setting, [appellant] is not going to be a problem" and that a life-sentenced appellant "would do well in prison." In addition to presenting Smithee's testimony that violence can occur within the Texas prison system,[14] the State also presented evidence that appellant had a "pattern of violence

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[14] For example, Smithee testified that a "defendant" within "the prison system" can be "as violent as he wants to be when that opportunity arises."

> Q. [STATE]: Is your testimony limited just to the fact that if a defendant chooses to exercise his choice and commit a violent crime within the prison system, is it your testimony that he will have the opportunity to do that?
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> A. [SMITHEE]: An individual can be as violent as he wants to be when that opportunity arises.

that stretche[d] back for 20 years." This evidence included numerous assaults that appellant committed during this period of time against various people, including members of his own family, with some of these assaults involving firearms.

An issue for the jury's determination was appellant's future dangerousness. *See* Article 37.071(b)(1), TEX. CODE CRIM. PROC. The trial court did not abuse its discretion to decide that Smithee's testimony that inmate violence can occur under current prison conditions had some relevance to, and would have aided the jury in determining, appellant's future dangerousness, such as considering whether a life-sentenced appellant, with his history of assault behavior, would have opportunities to commit violent acts in prison. *See Threadgill v. State*, 146 S.W.3d 654, 670-71 (Tex. Crim. App. 2004) (trial court did not abuse its discretion to admit photographs of bombs and weapons made by inmates in Texas prison system because "evidence regarding weapons made by prison inmates was at least marginally relevant to the testimony concerning inmate violence within various classifications of prison society"); *Canales v. State*, 98 S.W.3d 690, 699 (Tex. Crim. App. 2003) (testimony regarding inmates' ability to defeat locking mechanisms on prison cell doors relevant to future dangerousness special issue).

Appellant also claims on appeal that the admission into evidence of Smithee's testimony violated his Eighth Amendment right to individualized sentencing. The record, however,

reflects that appellant did not present this Eighth Amendment claim to the trial court. He, therefore, failed to preserve this Eighth Amendment claim for appellate review. See TEX. R. APP. PROC. 33.1(a)(1). Point of error four is overruled.

In point of error five, appellant claims that the State delivered improper jury argument at the punishment phase.[15] The record reflects that appellant's brother testified at the punishment phase that appellant broke into his home in February 1995. Appellant was indicted for burglary as a result of this incident. Appellant's brother testified that he told a police officer the day after the incident that he did not want to press charges and that he later signed "a form with the District Attorney's office asking them to not prosecute" appellant.

> Q. [STATE]: Okay. Now, let's talk about since that day. You told the police officer that night or that next day that you did not want to press charges against [appellant]?
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> A. [APPELLANT'S BROTHER]: Yes.

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[15] The question appellant presents in point of error five is:

> Was the prosecutor's assertion that Appellant's and his family's influence in persuading the prosecuting authorities to extend leniency for Appellant's involvement in a burglary of a family member's residence so prejudicial that it had a substantial and injurious effect or influence in determining the jury's answers to the special issues and therefore, affected Appellant's substantial right to a fair trial?

Q. And they did press charges against him, correct?

A. Correct.

Q. And later on, just a month or two later, basically, you changed your mind on that, didn't you, or you made a request of them. Is that a fair statement?

A. I believe so.

Q. What was that request?

A. I didn't want him to pay for any of the damages or anything like that.

Q. Did you also sign a form with the District Attorney's office asking them to not prosecute him?

A. I believe I did.

Q. What was your purpose in doing that?

A. I love him and respect him.

Appellant eventually received two years deferred-adjudication community supervision for that burglary offense pursuant to a plea bargain. During closing arguments, the State argued, over appellant's objection:

[STATE]: Mitigating evidence. You want to talk about that a little bit and we will for awhile. But right now, I want to particularly call your attention to one particular thing that they kept saying. You know, he's sorry, he's nice, he's a wonderful guy. Guess what folks? I submit to you that's the exact same thing he told the prosecutors back in 1995 and he got off light. He got a break because his family wanted him to have a break. And, Lord, help us, look where we are now. Because I'm sure that prosecutor thought long and hard about what to do because of the facts of the case–

[DEFENSE]: Judge, I'm going to object to that, that's inviting the jury to speculate outside the record.

[THE COURT]: The objection will be overruled.

[STATE]: –about the facts of that case, as well as the considerations that that family asked for leniency for their brother so he wouldn't have to testify. And they won the day and look where we are. You cannot allow them to win the day again. If you do, to whom and for what will we have to allow [appellant] to apologize for again?

Appellant claims that the State's "reference to facts suggesting that Appellant and his family took pains to influence the prosecution was not inferable from the evidence and as such, was wholly improper" by injecting into the trial "new facts harmful to Appellant." We decide that the State's argument was a reasonable deduction from brother Robert's testimony that he told a police officer that he did not want to press charges and that he believed that he later signed a form with the District Attorney's office not to prosecute appellant. *See Holberg v. State*, 38 S.W.3d 137, 141 (Tex. Crim. App. 2000) (a permissible area of jury argument is reasonable deduction from the evidence).

In addition, any error in the overruling of appellant's objection to the State's argument was harmless, because, on this record, any unsupported-by-the-record assertion that appellant's family may have influenced the authorities to show leniency on appellant in the 1995 burglary case had little, if any, influence on the jury's answers to the special issues. *See Johnson v. State*, 976 S.W.2d 410, 417 (Tex. Crim. App. 1998) (non-constitutional error is harmless when "the appellate court, after examining the record as a whole, has fair assurance that the error did not influence the jury, or had but a slight affect."). We believe that the jury's answers to the special issues turned primarily on the facts of the offense (the brutal murder of three neighbors in their home for no apparent reason) and appellant's history of assaultive conduct. We do not believe that the jury's answers to the special issues resulting in appellant's death sentence hinged on any efforts by

appellant's family to persuade the authorities to show leniency on appellant in the 1995 burglary case. *See id.* Point of error five is overruled.

We understand appellant to claim in point of error six that the trial court erroneously denied his request for a mistrial. He claims that he was entitled to a mistrial when the State's punishment-phase closing jury arguments directly commented on appellant's failure to take the stand at the punishment hearing to express remorse for murdering his three neighbors.[16]

The record reflects that appellant presented the testimony of a psychological expert (Schneider) whose testimony was based, in large part, on statements appellant made to him during a psychological evaluation after appellant committed the offense in this case. Schneider's written psychological evaluation of appellant was also introduced into evidence as Defense exhibit 1. Among other things, Schneider's written psychological evaluation of appellant concluded that "[p]ersonality assessment suggests [appellant] to be chronically depressed and to experience intense suspicion of others, to maintain a strict guardedness

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[16] The question appellant present in point of error six is:

> Did the trial court commit reversible error in failing to grant a mistrial as a result of the prosecutor's direct comment that Appellant had somehow neglected to demonstrate consideration or remorse for the crime of which he was convicted?

and distance from others and to feel some relative comfort only in solitary conditions."

Schneider testified consistently with his written psychological evaluation of appellant and also testified generally about "sociopathic behavior," with one of its indicators being "very little remorse." Schneider also testified that, with "the limited information" he had, he could not say "definitively" that appellant was "sociopathic,"[17] He also testified regarding appellant's demeanor during the evaluation, particularly "in specific reference" to this capital murder offense.

> Q. [DEFENSE]: What was his demeanor when he was talking with you on all these issues?
>
> A. [SCHNEIDER]: He was–he became–in specific reference to that incident, he became very quiet, very reserved, very guarded. I tried to,

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[17] Schneider also testified on cross-examination that sociopaths "show little remorse."

> Q. [STATE]: Let's talk a minute about antisocial personality disorder. Can you give me some criteria for that, sir–well, let me ask you, would the criteria include failure to conform with social norms?
>
> A. [SCHNEIDER]: Yes.
>
> * * *
>
> Q. And those that show little remorse?
>
> A. Yes.

> kindly as possible, get as much information as possible, but he became tearful and he just chose not to talk about it.

This was consistent with Schneider's written psychological evaluation of appellant, which stated:

> Regarding the incident(s) in question, Mr. Lucero was asked if he remembered the incident(s). He stated, "Yes." When asked to describe what led up to the incident in question, Mr. Lucero became tearful and chose not to discuss the actual incident. He stated that it occurred in September 2003, that he was home "just by myself." When asked what occurred on that day, he stated, "I just don't want to talk about it." The subject became withdrawn, tearful and unresponsive to any type of inquiry. The interview was completed at that point.

We understand appellant to have claimed, during the State's closing jury arguments, that the following emphasized portion of the State's jury argument could only have been understood by the jury as a comment on appellant's failure to take the stand to express remorse:

> [STATE]: He's a good killer. He slaughtered and massacred the heart

of the Robledo family in less than 2 minutes. He killed Pedro, Manuela and Fabiana, shot at Soccorro, and but, for I'll submit to you, the grace of God, for Guadalupe to be turned sideways so that the shot went through her arm before it struck her body, or she would be dead, also. And she was fortunate enough not to cut a major artery in her arm and she still nearly died.

This Defendant did all that in the presence of an 18-month-old boy, who now fears sirens, fears police, fears ambulances; and those are the folks he's supposed to trust and believe in. Will he ever get over that? Who knows?

The thing we do know is he will have to live with it for the rest of his life. **We don't know whether he's concerned about it at all, folks.**[18] We really don't–

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[18] The record, therefore, does not necessarily support the assertion that the State's jury argument was a reference to appellant's lack of remorse. The State's jury argument that "[w]e don't know whether [appellant's] concerned about it at all, folks" was consistent with Schneider's testimony and his written evaluation setting out appellant's statement, "I just don't want to talk about it."

[DEFENSE]: Judge, I'm going to object - may we approach the bench? (On-the-record conference had at Bench:)

[DEFENSE]: Judge, that last comment was an overt comment on the failure of the Defendant to testify and we would object.

[THE COURT]: The objection will be sustained.

[DEFENSE]: We would ask for an instruction to the jury to disregard that, and after that instruction, we would move for a mistrial.

[THE COURT]: The motion for a mistrial will be denied. I will give you an instruction about the comment.

[DEFENSE]: Thank you, Judge.

(Proceedings had in open court)

[THE COURT]: Ladies and gentlemen, I will instruct you to disregard any comments or arguments by the Prosecution as to whether or not the Defendant is concerned and I'll leave it at that.

Mr. Simms.

> [STATE]: From the evidence submitted to you by their witnesses, there's no evidence of that. That's what I'm telling you, folks. There's no evidence of that, just like there's no evidence of remorse. There's no evidence that what transpired and what will transpire in prison that he will try to do anything to help any of those inmates.
>
> He's controlling. He's jealous. He's manipulative. He's impulsive. He's irritable. He's aggressive. He's reckless, with a disregard for the safety of others. He has irresponsible work behavior. And he shows little remorse.

(Emphasis supplied).

On this record, it is not clear that the jury would have naturally understood the State's argument that "[w]e don't know whether [appellant's] concerned about it at all, folks" as referring to appellant's failure to take the stand at punishment to express remorse. *See Ladd v. State*, 3 S.W.3d 547, 569 (Tex. Crim. App. 1999) (State's jury argument commenting on defendant's lack of remorse could have been interpreted by jury as referring to testimony of psychiatrist, who testified that defendant was a sociopath and had no remorse

for his crimes).[19] To the extent that the State's argument could have been so construed by the jury, appellant was not entitled to a mistrial, because the trial court's instruction to disregard was sufficient to cure any prejudice stemming from the State's argument. *See Young v. State*, 137 S.W.3d 65, 69 (Tex. Crim. App. 2004) (grant of mistrial motion should be reserved for those cases in which an objection could not have prevented, and an instruction to disregard could not have cured, the prejudice stemming from an event at trial); *Caldwell v. State*, 818 S.W.2d 790, 799-800 (Tex. Crim. App.

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[19] Arguably, on this record, it would have been permissible for the State to have commented on appellant's lack of expression of remorse during his evaluation by Schneider, because such a comment is supported by the record and is encompassed within Schneider's evaluation of appellant, particularly whether appellant has indicators or characteristics of a sociopath. *Compare Renteria v. State*, 206 S.W.3d 689, 697 fn.4 (Tex. Crim. App. 2006) (prosecutorial unsupported-by-the-record comment on defendant's lack of expression of remorse may be impermissible comment on defendant's failure to testify). The jury, therefore, could have manifestly and naturally understood the State's argument as a permissible reference to appellant's lack of expression of remorse during his evaluation by Schneider and not as an impermissible reference to appellant's failure to take the stand at the punishment hearing to express remorse. *See Cruz v. State*, 225 S.W.2d 546, 548 (Tex. Crim. App. 2007) (test to determine whether prosecutorial argument is comment on a defendant's failure to testify "is whether the language used was manifestly intended or was of such a character that the jury would necessarily and naturally take it as a comment on the defendant's failure to testify") (quoting *Bustamonte v. State*, 48 S.W.3d 761, 765 (Tex. Crim. App. 2001)).

1991)[20] (any improper jury argument by State alluding to defendant's lack of remorse was cured by trial court's instruction to disregard).[21] In addition, appellant failed to object to the State's subsequent jury arguments that "there's no evidence of remorse" and that appellant "shows little remorse." Appellant, therefore, is not entitled to a reversal due to the State's earlier objected-to reference to appellant's lack of remorse. *Cf. Leday v. State*, 983 S.W.2d 713, 718 (Tex Crim. App. 1998) (overruling of objection to evidence will not result in reversal when other such evidence was received without objection, either before or after the complained-of ruling).

In point of error seven, appellant appears to argue that Article 37.071, TEX. CODE CRIM. PROC., is unconstitutional because it fails "to provide a method by which the State of Texas determines the deathworthiness of a capital defendant."[22] Appellant

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[20] Overruled on other grounds by *Castillo v. State*, 913 S.W.2d 529, 532-35 (Tex. Crim. App. 1995).

[21] Appellant claims on appeal that the trial court's instruction to disregard was "tepid" and "not forceful enough to cure the error." The record, however, reflects that appellant made no such claim at trial. In addition, appellant's argument that the trial court's instruction to disregard "was not forceful enough to cure the error" effectively concedes that any prejudice in the argument was curable by an instruction to disregard.

[22] The question appellant presents in point of error seven is:

> Does Art. 37.071 of the Texas Code of Criminal Procedure fail to provide a method by which the State of Texas determines the deathworthiness of a capital defendant, thereby eliminating consistency in the decision to seek the death penalty and weakening the

relies primarily on the Supreme Court's decision in *Bush v. Gore*, 531 U.S. 98 (2000). We have rejected the arguments that appellant appears to present in this point of error. *See Threadgill v. State*, 146 S.W.3d at 671-72 (rejecting defendant's argument that "because Article 37.071 fails to provide a mechanism by which the State determines the death worthiness of the Defendant, it does not provide 'some assurance that the rudimentary requirements of equal treatment and fundamental fairness are satisfied'"). Point of error seven is overruled.

The judgment of the trial court is affirmed.

Hervey, J.

Delivered: February 13, 2008
Publish

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degree of accuracy required in imposing death, in contravention of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution?

Appendix B

Cause No. 48.593-C

THE STATE OF TEXAS	§	IN THE 251ST DISTRICT
	§	COURT
v.	§	
	§	IN AND FOR
JIMMIE URBANO	§	
LUCERO	§	POTTER COUNTY,
	§	TEXAS

ORDER DENYING REQUEST FOR EVIDENTIARY HEARING

On this 2nd day of August, 2005, came on to be considered the Defendant's *Request for Evidentiary Hearing* filed in conjunction with the Defendant's *Motion for New Trial*. Having considered the arguments and authorities presented to the Court, the Court is of the opinion that the request should be denied.

IT IS, THEREFORE, ORDERED that the *Request for Evidentiary Hearing* is denied.

SIGNED this 2nd day of August, 2005.

/s/ Patrick A. Pirtle
Patrick A. Pirtle
Judge Presiding
251st Judicial District
Potter County, Texas

cc: District Clerk
District Attorney
Warren Clark

251ST JUDICIAL DISTRICT COURT

POTTER COUNTY COURTS BUILDING
500 S. FILLMORE
AMARILLO, TEXAS 79101
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FAX (806) 379.6743

Patrick A. Pirtle
Judge Presiding
Potter and
Randall Counties

Angela A. Johnson - Court Administrator
Debby Murphy - Court Reporter
Chuck Wieger - Bailiff

August 2, 2005

Mr. Warren L. Clark
Attorney at Law
P. O. Box 2408
Amarillo, Texas 79105

Mr. Randall Sims
47th District Attorney's Office
501 S. Fillmore, Suite 1A
Amarillo, Texas 79101

Re: Cause No. 48,593-C; *The State of Texas v. Jimmie Urbano Lucero*; In the 251st District Court, Potter County, Texas

Dear Counselors:

Upon receipt and review of the arguments and authorities presented to the Court, it is my reasoned judgment that the appropriate action for this Court to take is to deny the Defendant's *Request for Evidentiary Hearing*.

While I recognize that "sometimes trial courts choose to *wisely* make a full record of factual matters in death penalty cases", I believe that such action is contrary to the public policy being promoted by Rule 606(b) of the Texas Rules of Evidence, in that it would subject the jurors to the rigors of direct and cross examination regarding their deliberations. Such public scrutiny of confidential deliberations would discourage open discussion among jurors and could potentially be threatening to the entire jury process.

To conduct a hearing simply to make a record, without any expectation that the hearing would result in admissible evidence, does not protect jurors from the inconvenience and potential harassment that such a hearing would impose. Therefore, under the present circumstances, I do not believe that the Defendant has raised an issue which would require an evidentiary hearing.

I am enclosing herewith a copy of the *Order Denying Request for Evidentiary Hearing* which I have signed and entered this date.

Sincerely,

/s/ Patrick A. Pirtle
Patrick A. Pirtle

cc: District Clerk

Appendix C

No. 48,593-C

THE STATE OF TEXAS	X	IN THE 251st DISTRICT COURT
VS.	X	IN AND FOR
JIMMIE URBAN LUCERO	X	POTTER COUNTY, TEXAS

MOTION FOR NEW TRIAL

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, JIMMIE URBAN LUCERO, Defendant in the above-referenced and numbered cause, files this his Motion for New Trial and in support thereof would show the Court as follows:

I.

After retiring to deliberate on the issue of punishment, the jury foreman conducted an initial straw vote on both of the statutorily mandated special issues which addressed the probability that Defendant would commit criminal acts of violence in the future so as to constitute a continuing threat to society (special issue number 1) and whether there existed sufficient mitigating circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed (special issue

number 2). This initial vote revealed a majority of ten jurors who were prepared to vote "yes" to special issue number 1 and "no" to special issue number 2, thus necessitating the imposition of the death penalty. The remaining two jurors indicated their unwillingness to vote in such a way in which the death penalty would be imposed. At this juncture, the jury foreman produced his personal Bible and read to all members of the jury scripture from that Bible. This scripture addressed a Christian's duty to obey and consent to the laws of man. It also informed the listeners that those who opposed authority would experience condemnation.

The content of this scripture had the desired effect of coercing the two dissenting jurors to change their votes in order to insure a unanimous tally on both special issues. Thus, the receipt of the biblical scripture by the jury infringed on each individual juror's duty to base their verdict only on evidence received at trial. This receipt of other evidence was detrimental to Defendant's constitutional guarantee that the verdict at the punishment phase of the trial be truly unanimous, free from coercion and the product of the juror's individualized assessment of evidence lawfully admitted into during the punishment phase of the trial.

II.

In support of this motion, Defendant attaches the sworn affidavit of Juror Willa Warren.

III.

Defendant requests an evidentiary hearing so that he may adduce facts not in the record relevant to the issue described within.

WHEREFORE, PREMISES CONSIDERED, Defendant prays that upon hearing hereon, the Court grant this motion in its entirety and order a whole new trial on the merits.

Respectfully submitted,

WARREN L. CLARK
ATTORNEY AT LAW
203 W. 8th Ave., Ste. 320
P.O. Box 2408 (79105)
Amarillo, Texas 79101
806/379-7655
806/371-9610 (fax)

/s/ Warren L. Clark
Attorney for Defendant
SBN 04300500

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion For New Trial was provided to the office of the Potter County D.A.'s Office on this the 23 day of June, 2005.

/s/ Warren L. Clark
Warren L. Clark

JUROR AFFIDAVIT

My name is Willa Warren. I am over the age of 21 years of age, of sound mind and wish to state the following:

I served as a juror in the case styled *The State of Texas v. Jimmie Urban Lucero* in the 251st District Court in Potter County, Texas. During jury deliberations at the punishment phase of the trial, I recall that the jury foreman suggested that we take a "straw vote" or a preliminary vote on the two special issues to see where we, as the jury were. The initial vote on both special issues showed 10 jurors were in favor of answer the questions in a way in which the death penalty would be imposed. The remaining two jurors were unwilling to answer those questions in a way in which the death penalty would be imposed. It was a this point in time that the jury foreman took out a Bible which he had with him. He read some scripture from the Bible. This scripture had to do with a Christian's duty to obey, conform and consent to the will and laws of man. This reading of scripture occurred before the final votes were taken by the jury on the two special issues regarding the probability that the Defendant would commit criminal acts of violence in the future and sufficiency of mitigating evidence which

would justify a life sentence in place of the death penalty. Although there was not a unanimous vote by the jury as a whole on the two special issues before the reading of the scripture, the vote was unanimous on both special issues some time after the reading of scripture. The foreman of the jury then informed the bailiff and the Court that we had reached a unanimous verdict which called for the death penalty against Jimmie Lucero.

Signed this 23rd day of June, 2005.

/s/ Willa Warren
Willa Warren

SUBSCRIBED AND SWORN TO BEFORE ME, the undersigned authority, on this 23d day of June, 2005.

/s/ J. Lynda Smith
Notary Public in and for
State of Texas

Appendix D

251ST JUDICIAL DISTRICT COURT

POTTER COUNTY COURTS BUILDING
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Patrick A. Pirtle
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June 30, 2005

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Mr. Randall Sims
47th District Attorney's Office
501 S. Fillmore, Suite 1A
Amarillo, Texas 79101

Re: Cause No. 48,593-C; *The State of Texas v. Jimmie Urbano Lucero;* In the 251st District Court, Potter County, Texas

Dear Counselors:

I am in receipt of Mr. Clark's *Motion for New Trial* pertaining to the above-entitled and numbered cause and his letter requesting an evidentiary hearing with respect to the issue raised therein. My preliminary research has caused me some concern with respect to the propriety of conducting such a hearing.

A motion for new trial supported only by inadmissible statements does not raise a matter upon which an appellant could be entitled to relief. There is no requirement for a hearing if the motion for new trial and supporting affidavits are not adequate to place the trial court on notice that reasonable grounds for a new trial exist. *Jordan v. State, 883 S.W.2d 664* (Tex.Crim.App). 1994. Affidavit testimony to support a motion for new trial states reasonable grounds only if the matter discussed in the affidavit would be admissible in a subsequent hearing on the motion. *Dunkins v. State*, 8338 S.W.2d 894 (Tex.App.-Texarkana 1992, pet. ref'd).

The Defendant's *Motion for New Trial* in this case is supported by the affidavit of one juror, Willa Warren, in which she discusses matters allegedly occurring during jury deliberations. Rule 606(b) of the Texas Rules of Evidence provides that a juror "may not testify as to any matter or statement occurring during the jury's deliberations, of to the effect of anything on any juror's mind or emotions or mental processes, as influencing any juror's assent to or dissent from the verdict or indictment." This rule

of evidence has been construed to narrowly limit a juror's ability to testify to two specific situations: (1) whether any outside influence was improperly brought to bear upon a juror; and (2) to rebut a claim that the juror was not qualified to serve. Therefore, I believe that a serious question exists with respect to the admissibility of Ms. Warren's affidavit, or testimony.

Under such circumstances, it has been held that a trial court does not commit reversible error by declining to set a hearing or by declining to grant a motion for new trial. *Rhinehardt v. State*, 2003 W.L. 21674198 (Tex.App.-El Paso).

Based upon the above sand foregoing authorities, I am going to defer setting a hearing on this matter for a period of not less than 30 days. To assist the Court, I would request that counsel submit briefs on this issue prior to July 29, 2005. After that date, I will make a decision as to whether or not grant the Defendant's request for a hearing.

Sincerely,

/s/ Patrick A. Pirtle
Patrick A. Pirtle

cc: District Clerk

Appendix E

No. 48,593-C

THE STATE OF TEXAS	X	IN THE 251st DISTRICT COURT
VS.	X	IN AND FOR
JIMMIE URBAN LUCERO	X	POTTER COUNTY, TEXAS

MEMORANDUM OF LAW IN SUPPORT OF REQUEST FOR EVIDENTIARY HEARING

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, JIMMIE URBANO LUCERO, hereinafter referred to as Defendant, files this his Memorandum of Law in Support of Request for Evidentiary Hearing and in support thereof would show the Court as follows:

I.

On June 23, 2005, Defendant filed his Motion For New Trial which attached a sworn juror affidavit describing the introduction of Bible scripture by the jury foreman during punishment deliberations. According to the juror affidavit, the entire jury was exposed to the Bible reading at a time before the jury reached a unanimous verdict on the two statutorily mandated special issues which eventually resulted in

the trial court's imposition of the death penalty against Defendant.

On June 24, 2005, Defendant filed his Amended Motion For New Trial in which he added an additional ground of relief. This specific ground seeks to declare Art. 37.071 unconstitutional based on the rationale of *Tennard v. Dretke*, 542 U.S. ___, 124 S.Ct. 2562 (2004).

On June 30, 2005, the trial court communicated by letter to respective counsel and expressed doubt as to whether Defendant is entitled to a hearing on the motions for new trial filed in the cause. Specifically, the Court requested that the parties address the issue of whether Rule 606(b) Texas Rules of Evidence permits testimony from juror Willa Warren and others similarly situated concerning the subject matter of the Bible reading. As undersigned interprets the Court's letter, the key issue is whether the act of Bible reading in the presence of all jurors during jury deliberations on punishment and before a final vote on the two special issues constitutes an "outside influence improperly brought to bear upon a juror," thus constituting one of two identified situations where a juror may testify to a matter which occurred during jury deliberations. Defendant submits that the answer to this inquiry is a resounding "yes." Therefore, Defendant is entitled to an evidentiary hearing on his new trial motion in accordance with Rule 21.3(f) Texas Rules of Appellate Procedure.

II.

What is an "outside influence?"

The rule contemplates that an "outside influence" originates from sources *other* than the jurors themselves. *Ford v. State*, 129 S.W.3d 541, 550 (Tex.Ct.App.-Dallas 2003, pet. ref'd.); *Wooten v. S. Pac. Transp. Co.*, 928 S.W.2d 76, 78-79 (Tex.Ct.App.-Houston [14th Dist.] 1995, no writ.). "Outside influence" has also been understood to mean a force *external* to the jury and its deliberations. *Sanchez v. King, et al*, 932 S.W.2d 177, 183 (Tex.Ct.App.-El Paso 1996, no writ).

What constitutes an "outside influence?"

Extant Texas cases address a wide range of events, objects or forms of communication which constitute "outside influences" for purposes of analyzing adverse evidence received by a jury. The list runs from media coverage, *Drew v. State*, 76 S.W. 436, 460 (Tex.Ct.App.-Houston [14th Dist.] 2002, pet. ref'd.), *cert. denied* 123 S.Ct. 601 (2002) to photographs not admitted into evidence, *Carroll v. State*, 990 S.W.2d 761 (Tex.Ct.App.-Austin 1999, no pet.) to newspaper articles, *Knorpp v. State*, 645 S.W.2d 892 (Tex.Ct.App.-El Paso 1983, no pet.).

Persuasive authority provides other illustrations of a wide variety of "outside influences." They range from use of a Reader's Digest guide, entitled "You and the Law," *Moore v. State*, 172 Ga. App. 844, 324 S.E.2d 760 (1984) to the use of a

dictionary in jury deliberations, *Alvarez v. People*, 653 P.2d 1127 (Colo. 1982); *Smith v. State*, 95 So. 2d 525 (Fla. 1957); *Palestroni v. Jacobs*, 77 A.2d 183, 10 N.J. Super. 266 (1950). Use of an almanac has been considered to be an "outside influence." *Evans-Smith v. Commonwealth*, 361 S.E.2d 436, 447 (Va.Ct.App. 1987)

What about the reading of Biblical passages among the jurors during deliberations?

To this writer's knowledge, there appear to be no Texas cases directly on point concerning the issue at hand. However, there are several opinions from sister states which address the subject. In *People v. Harlan*, 109 P.3d 616, slip opinion no. 03SA173, delivered April 18, 2005 (Co. 2005), the Colorado Supreme Court found that the reading of Leviticus and Romans during jury deliberations in a capital murder case constituted "extraneous information" barred by appropriate state statutory and constitutional provisions. Likewise, in *Glossip v. State*, 29 P.3d 597, 604-05 (Okla. 2001), the Oklahoma Court of Criminal Appeals concluded that jurors' reading and reference to the Bible "and its verses" during jury deliberations "constituted receipt of extraneous material and an improper influence on the jury's deliberations." Parenthetically, it should be pointed out that Glossip acquired the go-ahead for his requested evidentiary hearing by attaching a juror affidavit noting discussion of and reading of the Bible by one or more jurors during deliberations. *Id.* at 604. And finally, in *May v. Kemp*, 706 F. Supp. 1534, 1558-59 (N.D. Ga. 1989), the federal district

court on habeas review found that the use of a Bible during jury deliberations in a state capital murder trial permitted the jury to decide issues with a aid of a "specific, extra-judicial code of conduct" which ultimately influenced the jury's deliberations in an unconstitutional manner. May's death sentence was set aside as a result.

III.

When is a defendant entitled to a hearing on a motion for new trial?

A defendant has a right to a hearing on a motion for new trial when the motion raises matters that cannot be determined from the existing record. *Reyes v. State*, 849 S.W.2d 812, 816 (Tex.Crim.App. 1993). If a defendant's motion for new trial and supporting affidavit are sufficient, a hearing on a motion for new trial is mandatory and the failure to afford the defendant such a hearing is a clear abuse of discretion. *Id.* at 816; *Bruno v. State*, 916 S.W.2d 4 ((Tex.Ct.App.-Houston [1st Dist.] 1995), *reh. denied en banc*, 937 S.W.2d 121 (1996), pet. ref'd.); *Vera v. State*, 836 S.W.2d 344, 347 (Tex.Ct.App.-Amarillo 1992, no pet.)

A defendant need not establish a prima facie case for a single cognizable ground raised in the motion for new trial. It is enough that reasonable grounds for relief which are not determinable from the record need be asserted. *Jordan v. State*, 883 S.W.2d 664, 665 (Tex.Crim.App. 1994); *Bruno v. State*, *supra*. Jury misconduct is one of several

reasons on which a motion for new trial may be granted. Rule 21.3(f) & (g) Texas Rules of Appellate Procedure. An allegation of juror misconduct must be supported by an affidavit of a juror or someone with sufficient knowledge indicating that juror misconduct has occurred. *Brown v. State*, 804 S.W.2d 566, 569 (Tex.Ct.App.-Houston [14th Dist.] 1991, pet. ref'd.) The affidavit must demonstrate that reasonable grounds exist for believing that jury misconduct occurred. *McIntire v. State*, 698 S.W.2d 652, 658 (Tex.Crim.App.1985); *Vera v. State*, 868 S.W.2d 433, 435 (Tex.Ct.App.-San Antonio 1994, no pet.)

IV.

Application of law to unique facts

Aside from the selected examples illustrated in the persuasive authority cited above, there can be no serious argument that the use of the Christian Bible among all jurors during the penalty deliberations in a capital murder prosecution constitutes as an "outside influence" being brought to bear on the jury. It certainly meets the threshold test enunciated in both the *Ford* and *Sanchez* cases: use of the Bible as a code of law and conduct which originates from a source *other* than the jurors and which operates as a force *external* to the jury, the court's charge and the jury's deliberations.

Logic dictates that as long as newspaper articles, media reports, a Reader's Digest publication, a dictionary or an almanac are

considered "outside influences" or "extraneous materials" whose use are prohibited during jury deliberations, this prohibition applies with the same or greater force to the use of and reference to the Christian Bible. This makes sense given the special reverence and authority the vast majority of typical Texas jurors afford the Bible as compared to other codes of law or conduct in force.

The juror affidavit filed with Defendant's motion for new trial establishes four crucial facts: that the jury foreman shared with all members of the jury biblical scripture during the punishment deliberations; that at the time that the scripture was read, punishment deliberations were ongoing and that there was no unanimity among the jury on the special issues; that the biblical passage read by the foreman to the jury dealt with a Christian's duty to obey the laws of man and that civil authority over man is appointed by God; and that the jury answered the special issues in such a way that the trial court was required to impose the death penalty against Defendant and that these answers to the special issues were reached and agreed upon by unanimous vote among the twelve jurors *after* the reading of the biblical scripture. This provides reasonable grounds for relief which are not determinable from the existing record. As such, Defendant is clearly entitled to a hearing by which he may develop the circumstances of the Bible reading and the exact content of the biblical verse read by the foreman to the entire jury. Since the motion for new trial has been timely filed and the juror affidavit is sufficient, Defendant's right to a hearing is mandatory. *accord:*

Reyes v State, 849 S.W.2d at 816; *Vera v. State*, 836 S.W.2d at 347-48 (holding that in the face of a timely filed motion for new trial with sufficient affidavit, a trial court which denies the accused his only opportunity to make a record on juror misconduct allegations abdicates its fact finding function and denies the accused meaningful appellate review, citing to *McIntire v. State*, 698 S.W.2d at 660.)

Yet there is another compelling reason why Defendant is entitled to a hearing on his motion for new trial. As can be gleaned from the two attached exhibits, undersigned counsel has attempted to secure additional information material to the ground of relief raised within the motion for new trial. As long as key jurors refuse to discuss the matter with counsel or with any representative of counsel, then Defendant is deprived of his need and obligation to develop the record upon which he carries the burden of persuasion, namely establishing that the content of the biblical verse read by the foreman to the jurors was adverse to the Defendant. Only through compulsory process and sworn testimony from key jurors at a hearing can all relevant facts be developed for this Court's ultimate determination of the merits underlying Defendant's motion.

WHEREFORE, PREMISES CONSIDERED, Defendant prays that upon consideration of this Memorandum of Law and attached exhibits, together with the Motion For New Trial with attached affidavit and his Amended Motion For New Trial, this Court grant Defendant's formal request for an evidentiary hearing on the allegations of juror

misconduct raised within said motion and hold said hearing prior to August 9, 2005.

Respectfully submitted,

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Amarillo, Texas 79101
806/379-7655
806/371-9610 (fax)

/s/ Warren L. Clark
Attorney for Defendant
SBN 04300500

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion For New Trial was provided to the office of the Potter Count D.A.'s Office on this the 14 day of July, 2005.

/s/ Warren L. Clark
Warren L. Clark

AFFIDAVIT

BEFORE ME, the undersigned authority, personally appeared Warren L. Clark, who, upon his oath, did state the following:

My name is Warren L. Clark. I am duly employed as an attorney in the State of Texas

and am licensed to practice in all of her county, district and appellate courts. I was appointed by the 251st District Court on May 27, 2005 to prosecute the appeal in *State of Texas v. Jimmie Urbano Lucero*, No. 48,593-C in the 251st District Court, Potter County, Texas in which Defendant Jimmie Lucero was assessed the death penalty.

Upon appointment, I began to contact jurors on the case and hold interviews with as many as possible. In compliance with the Order Sealing Records entered in this cause on July 7, 2005, I will refer to certain jurors by number only. For example, Juror No. 1 will necessarily mean that juror who was the first selected during the voir dire process, Juror No. 2 being the second selected and so on.

My first interviews were with Jurors Nos. 3, 4, 5, 6 and 7. Aiding me in the interview process was and is Attorney Max Peck who served as second chair trial attorney for Defendant Lucero. I requested that Attorney Peck contact Juror Nos. 11 and 12. I also attempted to contact Juror Nos. 1 and 8. Juror No. 8 failed to respond to my invitation to discuss the case. Juror No. 1 refused, through his wife as intermediary, to discuss the case with me. During my extended interview of Juror No. 6, I learned that the jury foreman, Juror No. 2, had read biblical scripture to the jury as a whole and that this reading occurred at a time when the jury had

not yet reached a final, unanimous decision. I called one or two other jurors with whom I had already talked to in order to confirm this fact. I also attempted to determine the content of the recited verse. After having confirmed from other jurors that the Bible reading had occurred, I personally contacted the jury foreman, Juror No. 2, over the phone and conducted a forty-minute interview with him. He confirmed the fact of the Bible reading, the timing of the reading and the content of the verse actually read. He also confirmed that at the time of the Bible reading, the jury was divided 10-2, meaning that there were 10 jurors in favor of answering the special issues in a manner which mandated imposition of the death penalty and two who were not. He identified those two jurors as Juror Nos. 1 and 3. After my conversation with the jury foreman, I corresponded with Juror No. 1 who previously had refused to talk with me about his service. This letter is marked as Exhibit No. 2 and attached hereto. I believed it critical to my duty to perfect the record and insure that Defendant Lucero be afforded an evidentiary hearing on this issue that I attempt to persuade Juror No. 1 to discuss his jury service with me. This was the reason behind the June 22nd letter. Juror No. 1 never responded to my letter nor have I ever been afforded the opportunity to talk personally with him about his jury service or any of the facts outlined in the affidavit of Juror No. 7.

After Attorney Peck indicated that Juror No. 12 had failed to return any of his phone calls requesting an interview, I personally called Juror No. 12 and left a voicemail at his number. I identified myself, my purpose for calling and provided him my cell and office number, much as I had with Juror No. 8, suggesting that he was free to call me back at any time so that I could meet and talk with him about his jury duty. To date, Juror No. 12 has never responded to my request nor has he ever called Attorney Peck back.

Signed this the 13th day of July, 2005.

/s/ Warren L. Clark

SUBSCRIBED TO AND SWORN BEFORE ME, the undersigned authority on this the 13th of July, 2005.

/s/ J. Lynda Smith
Notary Public in and for
The State of Texas

Appendix F

No. 48,593-C

THE STATE OF TEXAS	§	IN THE 251st
	§	DISTRICT COURT
v.	§	
	§	IN AND FOR
	§	
	§	POTTER COUNTY,
JIMMIE URBANO LUCERO	§	TEXAS

Legal Brief in Support of the State's Response to the Defendant's New Trial Motion

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, THE STATE OF TEXAS, in the above entitled and numbered cause, by and through Randall Sims, the 47th District Attorney, and files its Legal Brief in Support of the State's Response to Defendant's New Trial Motion. This brief was requested by the trial court by letter of June 30, 2005. In support thereof, the State would show the Court as follows:

Issue and the Summary of the State's Position

This Court has asked whether the affidavit of juror W___ W___ attached to defendant's Motion for New Trial is sufficient to require an evidentiary new trial hearing. The answer is that the affidavit and motion are inadequate to require a new trial

evidentiary hearing. This is because Texas Rule of Evidence 606(b) prohibits admission of those matters mentioned in W___ W___'s affidavit and the scripture reading was not an "outside influence" as it originated inside the jury deliberation room among the jurors themselves. In a closely analogous case involving Texas Rule of Evidence 606(b), ***Tinker v. State***, 148 S.W.3d 666, 673 (Tex.App.--Houston [14 Dist.] 2004, no pet.), the Court determined that the new trial motion could be overruled without a hearing. Consequently, the affidavit of W___ W____ is inadmissible and insufficient as a matter of law to mandate a new trial hearing.

In reaching this position and because this is a death penalty case where several additional legal proceedings will occur, it is necessary for the State to (1) review the new trial evidentiary hearing requirements; (3) survey the case law on Rule 606(b)'s applicability and constitutionality; (3) review Texas civil and criminal legal determinations on the "outside influence" exception to Rule 606(b); (4) distinguish the authority referenced in the defendant's Memorandum of Law in Support of Request for Evidentiary Hearing; and (5) review Texas and other state court decisions on Bible reading.

The Facts

Juror W___ W___ gave an affidavit about matters discussed during deliberations in the jury room by the jury foreman. In the defendant's new trial motion, there was a suggestion or inference based upon Juror W___ W___'s affidavit that two

jurors changed their votes based upon the reading of scripture from the Bible. W___ W___'s affidavit shows matters occurring during the jury's deliberations, affecting the mind or emotions or mental processes of the jurors, and suggesting an influence on two jurors' assent to the verdict. The matters discussed in her affidavit were matters that originated inside the jury deliberation room among the jurors themselves. Since that time, Juror W___ W___ has given a full explanation in a subsequent affidavit and the State has now obtained affidavits from the other 11 jurors. Juror W___ W___'s new affidavit states that she does not believe there was a connection between the Bible reading and the death penalty votes.

All jurors have signed affidavits for the State concerning the reading of the Bible during the punishment deliberations. Eleven jurors agree that there was no Bible passage read suggesting that a murderer should be executed under Biblical law. There was no Bible passage read about the principle of a fracture for a fracture, a limb for a limb, an eye for an eye, or a tooth for a tooth. There was no discussion that such Biblical principles should be considered or applied in this case against the Defendant, Jimmie Urbano Lucero. There was no suggestion that the scripture content was to convince any juror to vote in a way that would result in the death penalty. The other juror does not recall what scripture was read.

All twelve jurors agree that there was no suggestion that the Bible had the answer on the

questions regarding whether a life sentence or a death sentence should be imposed. There was no suggestion that the Bible should be consulted as the legal authority contradicting the law given in the court's instructions. There was no suggestion that the Bible should be consulted on factual issues as opposed to the evidence presented at the trial. Each juror's punishment decisions were based upon Texas law and evidence presented at trial not the Bible or the content of the scripture read to the jury.

All jurors agree that the scripture content or reading of the scripture did not violate any right of the defendant. The scripture reading was not utilized in a way to bring prejudice against the defendant. There was no harm to the defendant caused by the reading of the scripture or its content. On the dates the affidavits were signed, each juror was still comfortable with his or her individual decisions and votes in this case. They agree that the defendant received a fair and impartial trial.

The jurors who changed their votes unequivocally state that the reading of the scripture and its content had no effect on their votes on the issues presented to the jury.

Texas Rule of Evidence 606(b)

Texas Rule of Evidence 606(b) provides: "**(b) Inquiry Into Validity of Verdict or Indictment.** Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the jury's deliberations, or to the effect of anything on any

juror's mind or emotions or mental processes, as influencing any juror's assent to or dissent from the verdict or indictment. Nor may a juror's affidavit or any statement by a juror concerning any matter about which the juror would be precluded from testifying be admitted in evidence for any of these purposes. However, a juror may testify: (1) whether any outside influence was improperly brought to bear upon any juror; or (2) to rebut a claim that the juror was not qualified to serve."

Texas Courts Should Review State Civil Decisions

In the criminal context, although the case law has not clearly identified what constitutes an "outside influence" under Texas Rule of Evidence 606(b), it has rejected certain conduct as constituting outside influence. ***Graham v. State***, 2004 WL 813297, 2 Tex.App.--Texarkana,2004)(not designated for publication, Tex. R. App. P. 47.7); ***State v. Reid***, 2001 WL 1515843, 3(Tex.App.--El Paso,2001)(not designated for publication, Tex. R. App. P. 47.7); ***Hines v. State***, 3 S.W.3d 618, 623 (Tex.App.--Texarkana 1999, pet. ref'd). A number of the courts determining criminal cases have looked to the civil cases in determining whether any "outside influence" was brought to bear on a juror during deliberations. ***Tinker v. State***, 148 S.W.3d 666, 673 (Tex.App.--Houston [14 Dist.] 2004, no pet.); ***Franks v. State***, 90 S.W.3d 771, 799 -800 (Tex.App.--Fort Worth 2002, *pet. for discretionary review denied due to late filing*, 97 S.W.3d 584, Tex.Cr.App. 2003); *See* ***In re S.P.***, 9 S.W.3d 304, 308 (Tex.App.--San Antonio 1999, no pet.); **Hines v. State**, 3 S.W.3d at 622-23. In addition to those mentioned above, several other criminal

cases have reviewed the civil cases in interpreting the other Texas rules of evidence. ***Moon v. State***, 44 S.W.3d 589, 596 (Tex. App.--Fort Worth 2001, pet. ref'd); **Sparks v. State**, 943 S.W.2d 513, 515 -516 (Tex. App.--Fort Worth 1997, pet. ref'd); **Rodriguez v. State**, 926 S.W.2d 379, 382 (Tex. App.--San Antonio 1996, no pet.). So, it is logical to examine Texas civil law in determining this new trial motion.

In this regard, the Court of Criminal Appeals has determined that since the Texas Rules of (then, Civil and Criminal) Evidence were patterned after the Federal Rules of Evidence, cases interpreting federal rules should be consulted for guidance unless the Texas rule clearly departs from its federal counterpart. ***Cole v. State***, 839 S.W.2d 798, 801 (Tex.Cr.App.1990). Texas Rule of Evidence 606(b) permits a juror to testify about whether an "outside influence" was "improperly brought to bear on a juror." However, Federal Rule 606(b) contains an additional exception that permits a juror to testify as to whether extraneous prejudicial information was brought to the jury's attention. 2A Texas Practice Series Rule 606, Handbook on the Texas Rules of Evidence (2005). Consequently, since federal rule 606(b) is substantially different than the Texas evidentiary rule, its interpretation will not be reviewed.

The Texas Supreme Court on Rule of Evidence 606(b)

In 2000, the Texas Supreme Court examined a number of policy issues and considerations over several pages with regard to re-opening a jury's

verdict under Texas Rule of Evidence 606(b). ***Golden Eagle Archery, Inc. v. Jackson***, 24 S.W.3d 362, 366-375 (Tex. 2000). In that opinion, the Court determined that the federal rule differs from the Texas rule because the Texas provision deletes the federal exception that permits a juror to testify "whether extraneous prejudicial information was improperly brought to the jury's attention." *Id.* Acknowledging that it had not defined what "outside influences" were, the Texas Supreme Court also stated:

> Most Texas courts considering the question have held that the rules prevent a juror from testifying that the jury discussed improper matters during deliberation. *See, e.g., Soliz v. Saenz*, 779 S.W.2d 929, 933 (Tex.App.--Corpus Christi 1989, writ denied); *King v. Bauer*, 767 S.W.2d 197, 198 (Tex.App.--Corpus Christi 1989, writ denied); *Baley v. W/W Interests, Inc.*, 754 S.W.2d 313, 316 (Tex.App.--Houston [14th Dist.] 1988, writ denied); *Robinson Elec. Supply Co. v. Cadillac Cable Corp.*, 706 S.W.2d 130, 132 (Tex.App.--Houston [14th Dist.] 1986, writ ref'd n.r.e.); *Clancy v. Zale Corp.*, 705 S.W.2d 820, 828-29 (Tex.App.--Dallas 1986, writ ref'd n.r.e.). We agree. The rules contemplate that an "outside influence" originates from sources other than the jurors themselves.

The Texas Supreme Court further determined that Texas Rule of Evidence 606(b) did not violate the State Constitution's due process provision. ***Golden Eagle Archery, Inc. v. Jackson***, 24 S.W.3d at 374-75. Referencing ***Tanner v. United States***, 483 U.S. 107, 107 S.Ct. 2739, 97 L.Ed.2d 90 (1987), the Texas Supreme Court reiterated that (1) there were substantial common-law policy considerations against juror impeachment of verdicts in general, (2) potential jurors may be tested on voir dire, (3) jurors could report wrongful behavior before the verdict is reached and corrective action could be taken at that juncture, (4) verdicts can be confirmed or attacked by polling a jury, and (5) verdicts may be impeached by non-juror post judgment evidence. Consequently, the Texas Supreme Court, following the United States Supreme Court's determinations, concluded that Texas Rule of Evidence 606(b) does not violate the State Constitution's due process provisions and did not deprive the litigant of a fair trial. ***Golden Eagle Archery, Inc. v. Jackson***, 24 S.W.3d at 375.

Texas Cases on Rule of Evidence 606(6): What is not an "Outside Influence?"

In Texas civil cases, it has been stated that to constitute "outside influence," the influence must emanate from outside the jury and its deliberations. ***Blackmon v. Mixson,*** 755 S.W.2d 179, 183 (Tex.App.--Dallas 1988, no writ). This same interpretation was also referenced and applied in a recent criminal case. ***Franks v. State***, 90 S.W.3d at 799-800; *see also* ***Garcia v. State***, 2004 WL 1895184, 7 (Tex.App.--El Paso 2004, pet. ref'd)(not designated for publication, Tex. R. App. P. 47.7). In the civil and criminal

contexts, to constitute "outside influence," the "source of the information must be one who is outside the jury, i.e., a non-juror, who introduces the information to affect the jury's verdict." ***Soliz v. Saenz***, 779 S.W.2d at 932; ***Baley v. W/W Interests, Inc.***, 754 S.W.2d 313, 316 (Tex.App.--Houston [14th Dist.] 1988, writ denied). Information gathered by a juror and introduced to the other jurors by that juror, even if the information was introduced specifically to prejudice the vote, does not add up to outside influence. ***Soliz v. Saenz***, 779 S.W.2d at 932; ***Baley v. W/W Interests, Inc.***, 754 S.W.2d at 316.

A review of Texas cases stating what specific facts do not constitute an "outside influence" under Rule of Evidence 606(b) is necessary. A discussion of newspaper articles is not considered an outside influence. ***Baley v. W/W Interests, Inc.***, 754 S.W.2d at 315. A juror's copying of a dictionary definition from a dictionary and sharing it with other jurors does not constitute an "outside influence." ***Cooper Tire & Rubber Co. v. Mendez***, 155 S.W.3d 382, 413 (Tex.App.--El Paso 2004, pet'n for review filed); ***Perry v. Safeco Ins.*** Co., 821 S.W.2d 279, 281 (Tex.App.--Houston [1st Dist.] 1991, writ denied), *disapproved on other grounds by* ***Golden Eagle Archery, Inc. v. Jackson***, 24 S.W.3d at 362 (Tex. 2000) (magazine article discussion too). A juror's injection of his own personal expertise, experience, or knowledge does not satisfy the "outside influence" requirement. This is because such influence is said to start and flow inside the jury. ***Soliz v. Saenz***, 779 S.W.2d at 932; *see also* ***In re S.P.***, 9 S.W.3d at 309; ***Franks v. State***, 90 S.W.3d at 799-800. A discussion of insurance

coverage is not an outside influence. ***Moon v. Firestone Tire & Rubber Co.***, 742 S.W.2d 792, 793 (Tex.App.--Houston [14th Dist.] 1987, writ denied). Discussion of individuals similarly situated is not considered an outside influence. ***Marriage of Yarbrough***, 719 S.W.2d 412, 416 (Tex.App.--Amarillo 1986, no writ). Nor does vigorous, pushy influence of one juror upon the rest of the panel constitute "outside influence." ***Perry v. Safeco Ins. Co.***, 821 S.W.2d at 281.

There are other Texas cases in this vein. ***Crowson v. Kansas City Southern Railway Co.***, 11 S.W.3d 300, 304-05 (Tex.App.--Eastland 1999, no pet.) (textbook formula for discounting cash flows to discount value of plaintiff's lost future wages held not an outside influence); ***Wooten v. Southern Pac. Transp. Co.***, 928 S.W.2d 76, 78-79 (Tex.App.--Houston [14th Dist.] 1995, no writ) (in a suit alleging failure to maintain safe railroad crossing, juror's statement that, based on his past experiences and observations, railroad intersection was safe held not an outside influence).

Two jurors who visited the scene of the occurrence giving rise to the suit and told the other jurors their experiences and knowledge which they acquired was not an "outside influence." ***Baley v. W/W Interests, Inc.***, 754 S.W.2d at 316. However, now, if a juror visited the occurrence scene during the trial and before jury deliberations began, Rule 606(b) would not preclude a juror from testifying about the improper visit at a new trial motion. *See*

Golden Eagle Archery, Inc. v. Jackson, 24 S.W.3d at 370.

The Defendant's Referenced Rule 606(b) Cases Are Inapplicable

The State needs to address cases the defendant references in support of his new trial motion. The defendant in the new trial motion references a number of out-of-state cases concluding that books and magazines are "outside influences." Texas cases do not follow the "outside influence's interpretations of other sister state courts and some of these decisions may have been based upon a rule similar to federal evidence rule 606(b).

The State will now address referenced Texas cases. In one case, the Court, without citation to any authority and in dicta, stated that "[m]edia coverage about appellant constitutes an outside influence, and Rule 606(b) thus permits a juror to testify about such." ***Drew v. State***, 76 S.W.3d 436, 460 (Tex.App.--Houston [14 Dist.] 2002, pet ref'd). The statement was not necessary to the court's resolution because there was no affidavit attached to the motion for new trial showing that media coverage was discussed. The defendant also references ***Carroll v. State***, 990 S.W.2d 761, 762 (Tex.App.-Houston [141 Dist.] 2002, pet. ref'd) and ***Knorpp v. State***, 645 S.W2d 892, (Tex. App.–El Paso 1983, no pet.). These cases are distinguishable because they do not discuss Texas Rule of Evidence 606(b) and determined whether harmful new or other evidence was admitted before the jury as opposed to whether there was an "outside influence."

Texas Bible Reading Cases

In a statutory rape case, it was determined that the reading of the Bible by the jury during deliberations was not reversible error. ***Martin v. State***, 400 S.W.2d 919, 921 (Tex.Cr.App.), *cert. denied*, 385 U.S. 961, 87 S.Ct. 399, 17 L.Ed.2d 306 (1966). In a rape by force case where the death penalty was assessed, there was no reversible error even if one of the jurors quoted scripture from the Bible to other jurors. ***Branch v. State***, 447 S.W.2d 932,933 (Tex.Cr.App. 1969).

Other States on Bible Reading in Death Penalty Cases

Other sister state courts have decided similar issues. In a death penalty case decided by the Supreme Court of Indiana, there was no prejudice where juror evidence showed that Bible was not consulted as an extra-legal source of authority during deliberations. ***Bieghler v. State***, 690 N.E.2d 188, 203 (Ind. Sup. Ct. 1997). There, although the Bible was discussed in conjunction with the propriety of the death penalty at the guilt stage, the trial court found that the juror's testimony "establish[ed] that 'conscientious people' who are faced with a life and death decision resort to their religious scruples in making such decision[s]." ***Id.*** And, the Court concluded that such "deep introspection neither violate[s] principles of justice nor prejudices the defendant." ***Id.***

In a death penalty case decided by the Supreme Court of Georgia, defense counsel based his

argument to the jury that the death penalty should not be given, by tracing the history of the Bible from a surrounding in which the death penalty was imposed for such things as witchcraft and false prophesy, to a new milieu of forgiveness and mercy. ***Jones v. Francis***, 252 Ga. 60, 312 S.E.2d 300, 303 (Ga.1984). There, the Court concluded that the defendant was not harmed by the argument or the Bible going into the room with the jury. *Id.* The Court concluded it was unlike the situation where there was an "extraneous influence" on the jury. *Id.*

In a death penalty case out of Alabama, the Court determined that "[t]here was no prejudice where selections from Psalm 121, ("my help cometh from the Lord," and Luke, ("[j]udge not and ye shall not be judged ... forgive and ye shall be forgiven," were "intended to encourage, and had the effect of encouraging, the jurors to take their obligation seriously and decide the question ... based only on the evidence presented from the witness stand in open court."). ***McNair v. State***, 706 So.2d 828, 835-838 (Ala.Cr.App. 1997). In that case, there was no evidence to support the slightest inference that the prayers and Bible readings were prejudicial or that they might have unlawfully affected the verdict. So, the Court concluded, after reviewing the evidence, that reading from the Bible and praying in the jury room during deliberations, was not of such a character or nature as to indicate bias or corruption or misconduct that might have affected the verdict. *Id.*

In a death penalty case out of California, one juror read Romans 13:1-5. Also read was Numbers, chapter 35, verse 21: "Or if he struck him down with his hand in enmity and as a result he died, the one who struck him down shall surely be put to death" and Numbers, chapter 35, verse 16: "But if he struck him down with an iron object, so that he died, he is a murderer; the murderer shall be put to death." ***People v. Mincey***, 2 Cal.4th 408, 6 Cal.Rptr.2d 822, 827 P.2d 388, 425 (Cal. 1992). During the jury deliberations and after the trial judge learned these facts, the court admonished the jury to not consider the Bible or other materials and to decide the case on the law of the State of California and the facts presented at trial. Further, each juror stated that their verdict was not influenced by the scripture's content. The California Court determined there was no reversible error.

The Kansas Supreme Court has stated that, if a biblical passage given to a juror in a death penalty case was not shown to have affected the juror's decision, there was no reversible error. ***State v. Kleypus***, 272 Kan 894, 968-970, 40 P.3d 139,204-205 (Kan. Sup. Ct. 2001).

Rule 606(b) does not violate the Federal Constitution

The United States Supreme Court in ***Tanner v. United States,*** *supra,* concluded that Fed. Rule of Evidence 606(b) did not violate the Sixth Amendment's due process provision.

Distinguishing Defendant's Referenced Bible Reading Case Law

In his Memorandum of Law on page 3 of his brief, the defendant states that the Colorado Supreme Court found that the reading of Leviticus and Romans during deliberations constituted "'extraneous information' barred by appropriate state statutory and constitutional provisions." A further explanation is necessary. First, Colorado Evidence Rule 606(b) permits the admission of juror testimony on whether "extraneous prejudicial information was improperly brought to the jurors' attention." ***People v. Harlan***, 109 P.3d 616, 624 (Colo. Sup. Ct. 2005). Texas Rule of Evidence 606(b) does not possess this language relied upon in the Colorado case. The relevant Colorado question for determining prejudice is "whether there is a reasonable possibility that the extraneous information influenced the verdict to the detriment of the defendant; if so, the verdict must be reversed." ***People v. Harlan***, 109 P.3d at 625. So, the legal basis of the admission of juror testimony in Colorado is not persuasive authority in this Texas case, State v. Jimmie Lucero. A second distinction is several Colorado jurors consulted the Bible's provisions relating to capital punishment. Third, the extraneous materials contained a passage mandating the death penalty for murders and civil obedience to authorities. Fourth, the Colorado trial court made findings that there was a reasonable possibility that the use of the Bible in the jury room to demonstrate a requirement of the death penalty for the crime of murder would have influenced a typical juror to reject a life sentence for the capital defendant. ***People v Harlan***, 109 P.3d at 623.

Moreover, although Romans 13:1-6 was read in the State v. Jimmie Lucero jury deliberations, it was not considered with other Biblical death penalty mandates. Consequently, the submission to "authority" portion of the scripture would be the law of Texas as provided in the trial court's instructions as opposed to Biblical law or the position expressed by the prosecution as mere advocates in the justice system.

On page 4 of the defendant's Memorandum of Law, the defendant references ***May v. Kemp***, 706 F.Supp. 1534, 1558-59 (N.D. Ga. 1989) for the proposition that Bible reading "during jury deliberations in a state capital murder trial permitted the jury to decide issues with a aid of a 'specific, extra-judicial code of conduct' which ultimately influenced the jury's deliberations in an unconstitutional manner." However, the referenced case is bottomed on the ground that "it was constitutional error for the **[trial] court to [knowingly] permit the Christian Bible** to go into the jury room **at the request of the jurors apparently for consultation** in connection with their deliberations." [Emphasis added.] ***Id.*** at 1560. The case was also apparently decided on the extraneous prejudicial information clause of evidence rule 606(b) similar to the federal rule, ***id.*** at 1558 & 156. That clause is not contained in the Texas rule.

At page 3 and 4 of his Memorandum of Law, the defendant references ***Glossip v. State***, 29 P.3d 597, 604-05 (Okla. Crim. 2001) for the proposition

that it was "concluded that jurors' reading and reference to the Bible 'and its verses' during [death penalty] deliberations 'constituted receipt of extraneous material and an improper influence on the jury deliberations." However, this case was reversed on other grounds and any statements regarding Bible reading were cautionary according to the opinion and unnecessary to the resolution of the case. *Id.* at 603 & 605. The case was also apparently decided on the extraneous prejudicial information clause of evidence rule 606(b) similar to the federal rule. *Id.* at 605. Again, that provision is not contained in Texas evidence rule 606(b).

Law – General Law on Requirement for New Trial Hearing

In *Wallace v. State*, 106 S.W.3d 103, 108 (Tex.Cr.App. 2003), the Court of Criminal Appeals stated:

> A defendant is entitled *to a hearing* on his motion for new trial if the motion and accompanying affidavit(s) "rais[e] matters not determinable from the record, upon which the accused could be entitled to relief." *Reyes v. State*, 849 S.W.2d 812, 816 (Tex.Crim.App.1993). To be sufficient to entitle the defendant to a hearing, the motion for new trial and accompanying affidavit(s) "need not establish a prima facie case" for a new trial. *Jordan v. State,* 883 S.W.2d 664, 665 (Tex.Crim.App.1994). Rather, they "must merely reflect that reasonable grounds exist for holding that such relief could be granted."

> *Martinez v. State*, 74 S.W.3d 19, 22 (Tex.Crim.App. 2002). The purpose of the hearing is to give the defendant an opportunity to fully develop the matters raised in his motion. *Id.* at 21. If the trial court denies a hearing on the motion for new trial and the defendant appeals from that denial, the appellate court must review the trial court's decision for abuse of discretion. *Id.* at 22.

Law–A Defendant's New Trial Motion and Attached Affidavit(s) Are Insufficient If They Do Not Show "outside influence." In That Event, No New Trial Hearing Is Required.

Rule 606(b) prohibits jurors from testifying as to matters or statements that occurred during formal jury deliberations or as to the mental processes of any juror. The exception in former Criminal Rule 606(b), which allowed jurors to testify as to any matter relevant to the validity of the verdict, has been repealed by new Rule 606(b). *Hicks v. State*, 15 S.W.3d at 630; *Hines v. State*, 3 S.W.3d at 621. Rule 606(b) further renders inadmissible in such an inquiry "a juror's affidavit or any statement by a juror concerning any matter about which the juror would be precluded from testifying."

In a case closely analogous to the instant case, *Tinker v. State*, 148 S.W.3d 666, 673 (Tex.App.–Houston [14 Dist.] 2004, no pet.), (1) appellant attached an affidavit from one of the jurors in support of his motion for new trial; (2) the affidavit described how the jury reached a verdict of guilty

during deliberations for reasons other than guilt; (3) no other affidavits were used to support the motion; and (4) the State moved to quash the juror's affidavit under Texas Rule of Evidence 606(b). There, the trial court quashed the affidavit and denied the motion for new trial without a hearing. After reviewing the juror's affidavit, that appellate court determined that the affidavit addressed only matters which the juror learned during jury deliberations and clearly came from the other jurors and, as such, did not constitute an outside influence. *Id.* Consequently, a juror's affidavit that described matters that did not constitute outside influence could not be used to support the motion for new trial based on jury misconduct. *Id.*

Application of Fact to the Law

Here, the defense affidavit of W___ W___ attached to Defendant's Motion for New Trial establishes that no "outside influence" was improperly brought to bear upon any juror. It merely stated that the Bible was read during the deliberations by the foreperson and later two jurors changed their preliminary votes. The referenced events by W___ W___ originated inside the jury room among the jurors themselves and, as a result, there are no reasonable grounds for holding that new trial relief could be granted.

The State in its Response to the New Trial Motion and its Original Motion to Quash has objected to the defense affidavit of W___ W___ and sought its quashal. The defense affidavit of W___ W___ is insufficient as a matter of law under Texas

Rule of Evidence 606(b) because it contains statements occurring during the jury deliberations and shows that there was no "outside influence." The Bible Reading is the same a reading a magazine, a dictionary, or other book in the jury room. Under these circumstances, this Court is not required to hold a new trial hearing. ***Tanker v. State***, 148 S.W.3d at 673.

Attorney Clark has also filed an affidavit and attached it to the Memorandum of Law in Support of Request for Evidentiary Hearing. The State has objected to those portions of Clark's affidavit that report what other juror(s) have stated to him because they constitute inadmissible hearsay. When all hearsay portions of the affidavit are excluded, there is nothing left that would show matters outside the jury deliberations or an "outside influence." Even if those portions of Clark's affidavit were admissible against a hearsay objection, they are matters occurring during deliberations and do not constitute an "outside influence" and, as a result, no new trial hearing is required by law. The affidavit does not show reasonable grounds for believing that new trial relief could be granted.

Without waiving any of the above and accompanying arguments and objections, the State has obtained affidavits from all jurors, including a new one from W___ W___, who has now given a more detailed explanation. They all allege (1) there was no suggestion that the Bible had the answer on those questions regarding whether a life sentence or a death sentence should be imposed; (2) there was no

suggestion that the Bible should be consulted as the legal authority contradicting the law in the court's instructions; (3) there was no suggestion that the Bible should be consulted on factual issues as opposed to the evidence presented at the trial; (4) the jury's punishment decisions were based upon law of the State of Texas and evidence presented at trial not the Bible or the content of the scripture read to the jury; (5) the scripture content or reading of the scripture did not violate any right of the defendant; (6) the scripture reading was not utilized in a way to bring prejudice against the defendant; (7) there was no harm to the defendant caused by the reading of the scripture or its content; (8) the defendant received a fair and impartial trial; (9) all jurors were comfortable with their individual decisions and votes in this case; and (10) the jurors who changed their votes unequivocally state that the reading of the scripture and its content had no effect on their votes on the issues presented to the jury. Even so, the affidavits obtained by the State were an attempt to controvert any claim on any legal theory that somehow the reading a scripture from the Bible was wrongful or harmed the defendant.

The State, in an abundance caution and because this is a death penalty case, obtained these affidavits. Specifically, the State was concerned that (1) the serving jurors could forget what happened during the deliberations; (2) jurors could die; (3) jurors could become disabled; (4) the interpretation of rules regarding "outside influence" could be changed at a future date and the affidavits become admissible; (5) new case or statutory law

permitting legal theory might arise or be asserted in the future; and (6) judges might have some concern in a death penalty case about whether jurors considered the Biblical law as an extra judicial code above the laws of Texas or the jury ignored the facts. So, the State has obtained the controverting affidavits to lay to rest forever this issue. Although the State has obtained these affidavits, they are still inadmissible under current Texas law because they do not establish any "outside influence" that affected any juror's decision.

Respectfully submitted,
Randal Sims, 47th District Attorney

/s/ Mark Baskett
MARK BASKETT
Date: July 25, 2005
47th Assistant District Attorney
Potter County Courts Building
501 S. Fillmore, Suite 5A
Amarillo, Texas 79101
(806) 379-2325;
Fax (806) 379-2823
SBN 01870600

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing instrument was served upon the following attorney(s) of record in the above-referenced cause, as shown below on or before the 27th day of July, 2005.

Via:

☑ U.S. Regular Mail, Postage Prepaid

☐ Hand Delivery

☐ Certified Mail RRR # _____

☐ Facsimile 371-9610

Warren Clark
P.O. Box 2408
Amarillo, Texas 79105

/s/ Mark Baskett
Mark Baskett

No. 48,593-C

THE STATE OF TEXAS	§	IN THE 251st DISTRICT COURT
v.	§	
	§	IN AND FOR
	§	
JIMMIE URBANO LUCERO	§	POTTER COUNTY, TEXAS

The State's Original Response to Defendant's Amended Motion For New Trial and The State's Original Motion to Quash the Affidavits Filed in Support of Defendant's New Trial Motion

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, THE STATE OF TEXAS, in the above entitled and numbered cause, by and through Randall Sims, the 47th District Attorney, and makes its response to Defendant's Amended Motion for New Trial. The State also files its Original Motion to Quash the Affidavit(s) Filed in Support of the Defendant's New Trial Motion. In support thereof, the State would show the following.

I.

The State objects under Texas Rule of Evidence 606(b) to any evidence regarding all matters in the Affidavit of W___ W___ attached and filed in support of the Defendant's Motion for New Trial. The State objects to any inadmissible evidence under Texas Rule of Evidence 606(b) included in the Affidavit of attorney Warren Clark attached to the defendant's Memorandum of Law. The State also

objects to Clark's affidavit on hearsay grounds as to all those matters that refer to what he was told by any juror. Additionally, the State seeks to quash, these two affidavits.

II.

Texas Rule of Evidence 606(b) provides: "**(b) Inquiry Into Validity of Verdict or Indictment.** Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the jury's deliberations, or to the effect of anything on any juror's mind or emotions or mental processes, as influencing any juror's assent to or dissent from the verdict or indictment. Nor may a juror's affidavit or any statement by a juror concerning any matter about which the juror would be precluded from testifying be admitted in evidence for any of these purposes. However, a juror may testify: (1) whether any outside influence was improperly brought to bear upon any juror; or (2) to rebut a claim that the juror was not qualified to serve."

III.

Texas Rule of Evidence 606(b) prohibits jurors from testifying as to matters or statements that occurred during formal jury deliberations or as to the mental processes of any juror. The exception in former Criminal Rule 606(b), which allowed jurors to testify as to any matter relevant to the validity of the verdict, has been repealed by new Rule 606(b). ***Hicks v. State***, 15 S.W.3d 626, 630 (Tex.App.--Houston [14th Dist.] 2000, pet. ref'd); ***Hines v. State***, 3 S.W.3d 618, 621 (Tex.App.--Texarkana 1999, pet. ref'd).

IV.

Allegations in a motion for new trial must be proved by competent evidence, which must be received by the court before it can be considered. ***Lincicome v. State***, 3 S.W.3d 644, 646 (Tex.App.-- Amarillo 1999, no pet.). The trial court need not consider inadmissible jury statements presented through a hearsay affidavit. ***Id.*** at 647; ***see also*** Caldwell v. State, 2003 WL 21982148, 6 (Tex.App.-- Houston [14 Dist.] 2003, pet. ref'd)(not designated for publication Tex. R. App. P. 47.7). Rule 606(b) does not preclude the testimony of a non-juror who possesses **personal knowledge** of juror misconduct. ***Golden Eagle Archery, Inc. v. Jackson***, 24 S.W.3d at 369; ***Mayo v. State***, 708 S.W.2d 854 (Tex.Cr.App.1986). The trial court has discretion to sustain the State's objection to a new trial affidavit on hearsay grounds.

V.

In this regard, the State recognizes sometimes trials courts choose to wisely make a full record of factual matters in death penalty cases.

VI.

In the event that the trial court determines that a full evidentiary hearing is required, the State must object to the filed affidavits attached to the defendant's new trial documents and seek quashal. If a new trial hearing is conducted, the State must object to avoid any waiver. The State intends to preserve its error or objection to Texas Rule of Evidence 606(b).

VII.

In the event that the trial court determines that a full evidentiary hearing is required, the State would be compelled to produce at least affidavit evidence to rebut any suggestion that the Bible or scripture reading (1) somehow affected the verdict, (2) denied the defendant due process, (3) denied the defendant any statutory or constitutional right, (4) the jury considered Biblical law, (5) there was an "outside influence," or (6) the jury impermissibly considered the content of the Bible.

VIII.

Specifically, if a full evidentiary hearing is required, the State would be impelled to conditionally present affidavits or live testimony because (1) the serving jurors could forget what happened during the deliberations; (2) jurors could die; (3) jurors could become disabled; (4) the interpretation of rules regarding "outside influence" could be changed at a future date and the affidavits become admissible; (5) new case or statutory law permitting a legal theory might arise or be asserted in the future; and (6) judges might have some concern in a death penalty case about whether jurors considered the Biblical law as an extra judicial code above the laws of Texas or the jury ignored the facts.

IX.

The State's position is that the Defendant should receive one fair and impartial trial. The State's position is that this Defendant has obtained a fair and impartial trial. Although few, if any, contested trials are perfect, the State's position is

that it does not want to act in any way at this juncture or any juncture to cause reversible error.

X.

In an abundance of caution, and without waiving any of the above and foregoing objections, the State has attached affidavits of the jury foreperson and the 11 jurors.

XI.

The State's attached affidavits establish that the scripture reading or scripture was not related to the verdict rendered. The verdict was based upon Texas law in the trial court's written instructions and the evidence presented. The affidavits suggest that the scripture was utilized to comfort juror(s) or to suggest that the court instructions should be followed.

XII.

The courts instructions should have been followed because the jurors are sworn to answer questions presented to them in the court's charge. In passing, the State emphasizes that jurors are sworn to "render a true verdict according to the law and the evidence, so help you God." Texas Code of Criminal Procedure § 35.22.

XIII.

If the trial court determines that the jury should not have read the scripture for any reason, any error in reading the scripture and any brief comment about it should be disregarded. In the

alternative, any error was harmless beyond a reasonable doubt.

XIV.

Initially, the State will file a copy of the affidavits in the District Clerk's file with each of the juror's names blotted out. The State will later present a copy of the original affidavits to the Court with an Ex parte temporary motion and order requesting that the originals be sealed and made a part of the Clerk's record. In attempting not to reveal the identities of the jurors at this juncture, the State will refer to Jurors by sequential numbers in the order in which then were chosen to serve on this jury.

XV.

In Defendant's amended new trial motion, he also asserts that the Texas statutory scheme is unconstitutional on various federal constitutional grounds. The defendant references ***Tennard v. Dretke***, *infra*, for the proposition that the article 37.071 of the Texas Code of Criminal Procedure unconstitutionally narrows the jury's discretion to factors concerning only moral blameworthiness. In that regard, he says the statute "instructs the jury that it may not consider mitigating evidence which it does not find to be sufficiently connected to the crime to reduce moral blameworthiness."

XVI.

This is a pure legal attack and does not require an evidentiary hearing. The argument appears to have been foreclosed by a recent Court of

Criminal Appeals determination. In *Perry v. State*, 158 S.W.3d 438, 449 (Tex.Cr.App. 2004), the Court determined:

> In a supplemental point of error, appellant claims that it offends "the principles underlying [the United States Supreme Court's recent decision in] *Tennard v. Dretke*, [--- U.S. ---, 124 S.Ct. 2562, 159 L.Ed.2d 384 (2004)] to instruct a capital sentencing jury to disregard evidence that the jurors do not find to be sufficiently connected to the crime to reduce moral blameworthiness." This Court has decided that the mitigation special issue "does not unconstitutionally narrow the jury's discretion to factors concerning only moral blameworthiness." *See Cantu v. State*, 939 S.W.2d 627, 648-49 (Tex.Cr.App.), *cert. denied*, 522 U.S. 994, 118 S.Ct. 557, 139 L.Ed.2d 399 (1997). The Supreme Court's *Tennard* decision, which was decided under another statutory scheme that did not include the mitigation special issue, does not hold otherwise. *See Tennard*, --- U.S. at ---, 124 S.Ct. at 2569- 72 ("impaired intellectual functioning" is inherently mitigating and, therefore, meets the definition of "constitutionally relevant" mitigating

evidence). The supplemental point of error is overruled.

As such, time trial court should overrule the motion for new trial without a hearing.

CONCLUSION

The State prays that the trial court sustain its objection to the defense affidavits, quash the affidavits, and overrule the defendant's motion for new trial without a hearing. The State further requests any other relief, at law or in equity, to which it may be justly entitled.

Respectfully submitted,
Randal Sims, 47th District Attorney
/s/ Mark Baskett
MARK BASKETT
Date: July 25, 2005
47th Assistant District Attorney
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(806) 379-2325;
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SBN 01870600

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing instrument was served upon the following attorney(s) of record in the

above-referenced cause, as shown below on or before the 27th day of July, 2005.

Via:

☑ U.S. Regular Mail, Postage Prepaid

☐ Hand Delivery

☐ Certified Mail RRR # _____

☐ Facsimile 371-9610

Warren Clark
P.O. Box 2408
Amarillo, Texas 79105

/s/ Mark Baskett
Mark Baskett

No. 48,593-C

THE STATE OF TEXAS	§	IN THE 251st
	§	DISTRICT COURT
v.	§	
	§	IN AND FOR
	§	
JIMMIE URBANO LUCERO	§	POTTER COUNTY,
	§	TEXAS

AFFIDAVIT _____ FOR STATE'S ANSWER TO DEFENDANT'S MOTION FOR NEW TRIAL

STATE OF TEXAS	§
&	§
COUNTY OF POTTER	§

My name is _____ I am over 18 years of age, have never been convicted of a felony, and am fully competent to give this affidavit. I have received nothing of value to make this affidavit. I can read and write the English language. I make this Affidavit without any threat, force, fraud, duress, promise of benefit, inducement, or representation of any kind by any person whomsoever. At the time of making this affidavit, I am completely sane, sober, and capable of understanding the character of my acts and deeds.

I served _____ on the capital murder case, styled "The State of Texas v. Jimmie Urbano Lucero." In making this affidavit, I have reviewed relevant portions of the punishment jury charge given to us by Judge Pirtle, been shown the

Defendant's Motion for New Trial, and reviewed an affidavit signed by _____. These materials were supplied to me by a person in the 47th District Attorney's Office. _____ _____ Judge Pirtle was the judge over the above referenced capital murder case involving Jimmie Urbano Lucero. A certified copy of the punishment jury charge and verdict form in this case is attached to my affidavit as "Exhibit A." The affidavit signed by _____ and the Motion for New Trial are attached to this affidavit as "Exhibit B."

The attached jury charge also provided that:

> In arriving at the answers to the Special Issues submitted, during your deliberations you must not consider, discuss, nor relate any matters not in evidence before you. You should not consider nor mention any personal knowledge or information you may have about any fact or person connected with this case which is not shown by the evidence.
>
> Nor are you to arrive at your answers by lot or by chance; or by any other manner than by a full, fair and free discussion of the evidence bearing thereon.
>
> You, the jury, are the exclusive judges of the credibility of the witnesses, of the weight to be given the evidence and of the facts proved, but you are bound to receive

the law from this Court as given in this charge and be governed thereby.

You are charged that it is only from the witness stand that the jury is permitted to receive evidence regarding the case, or any witness therein, and no juror is permitted to communicate to any other juror anything he or she may have heard regarding the case or any witness therein, from any source other than the witness stand.

After going back into the jury deliberation room during the punishment stage, I read the attached punishment jury charge aloud before deliberations commenced. I followed the court's instructions. The jury was bound to follow the jury instructions given to us by the court. To my knowledge, each juror and the jury, as a whole, complied the court's instructions in this case.

The jury in detail discussed specific facts on the questions submitted to us at the punishment stage. The jury discussed whether there were facts that showed beyond a reasonable doubt that there was a probability that the Defendant, Jimmie Urbano Lucero would commit criminal acts of violence that would constitute a continuing threat to society. We also discussed the facts presented from the witness stand and that took into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant,

and determined whether there was a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed.

At some juncture before the final vote was taken that lead to the punishment verdict, I read some scripture from the Bible. I believe the scripture reading was early in the punishment deliberations. No scripture was read at the guilt stage deliberations. I read Romans 13:1-6 from the New International Version of Bible, as follows:

Romans 13

Submission to the Authorities

1Everyone must submit himself to the governing authorities, for there is no authority except that which God has established. The authorities that exist have been established by God. 2Consequently, he who rebels against the authority is rebelling against what God has instituted, and those who do so will bring judgment on themselves. 3For rulers hold no terror for those who do right, but for those who do wrong. Do you want to be free from fear of the one in authority? Then do what is right and he will commend you. 4For he is God's servant to do you good. But if you do wrong, be afraid, for he does not bear the sword for nothing. He is God's servant,

an agent of wrath to bring punishment on the wrongdoer. 5Therefore, it is necessary to submit to the authorities, not only because of possible punishment but also because of conscience. 6This is also why you pay taxes, for the authorities are God's servants, who give their full time to governing.

The reading of the Bible took less than 2 minutes out of several hours of deliberations discussing the charged law and the facts. No other scripture was read or discussed. There was no passage read that a murderer should be executed under Biblical law. There was no passage read about the principle of a limb for a limb or an eye for an eye. There was no discussion that such a Biblical principle should be considered or applied in this case to the Defendant, Jimmie Urbano Lucero. After the reading of the scripture, I made a comment to the effect that we needed to follow the laws and those in authority in this case. This comment and the scripture was completely congruent with the trial court's instructions. The entire time spent on the scripture and my comment was probably less than 2 and ½ minutes. I have seen documentation that on May 26, 2005, the jury retired to deliberate at 12:20 p.m. and reached a verdict at 4:58 p.m. These times are in accord with my memory of these events.

The reading of this scripture was not an attempt on my part to convince any juror to vote in a way that would result in the death penalty. I wanted to read scripture because of the seriousness of the

decision at hand and to suggest that the man's law as charged in the judge's instructions should be followed. There was no suggestion that the Bible had the answer on the questions regarding whether a life sentence or a death sentence should be imposed. There was no suggestion that the Bible should be consulted as the legal authority contradicting the law of the court's instructions. There was no suggestion that the Bible should be consulted on factual issues as opposed to the evidence presented at the trial. To my knowledge, the reading of the scripture did not cause anyone to change their vote or to vote in a way that would have resulted in a death penalty being imposed. In my opinion, based upon the discussions during jury deliberations, our decision was based upon the evidence presented during the course of trial from the witness stand not on the reading of the scripture or the scripture's content. In my opinion, each member of the jury gave his or her individual guilt and punishment determinations based upon the law and evidence presented at trial. This is certainly true for me.

I am a conscientious person, who was faced with a life and death decision. I do not believe that the reading of the scripture violated the principles of justice. The reading of the scripture was not meant to violate any right of the defendant. The scripture reading was not meant to act in any way to bring prejudice against the defendant.

Moreover, in the overall scheme of about a two week trial and several hours of deliberations, the

above Bible reading was not related to the verdict returned to the court. Further affiant says nothing.

_____

Affiant,

SUBSCRIBED AND SWORN TO BEFORE ME this 6th day of July, 2005, to certify which witness my hand and official seal.

/s/ Wayne Murphy
Notary Public, State of Texas

Wayne Murphy
Notary's Printed Name

My Commission Expires: 10-22-06

Appendix G

No. 48,593-C

THE STATE OF TEXAS	X	IN THE 251st DISTRICT COURT
VS.	X	IN AND FOR
JIMMIE URBAN LUCERO	X	POTTER COUNTY, TEXAS

DEFENDANT'S RESPONSE TO STATE'S ANSWER AND BRIEF
ADDRESSING MOTION FOR NEW TRIAL

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, JIMMIE URBAN LUCERO, Defendant in the above-styled and numbered cause, files this his Response to the State's Answer and Brief filed in the cause pertaining to Defendant's Motion for New Trial and Amended Motion For New Trial as well as his request for an evidentiary hearing and in support thereof would show the Court as follows:

I.

Standard of review

It is important to not lose sight of the fact that Defendant's Motion For New Trial as well as his

amended motion raises the issue of whether an outside influence was *improperly* brought to bear upon any juror. Rule 606(b) Texas Rules of Evidence. If the issue is *raised* and cannot be determined adequately from the existing record, our law, in fairness and in recognition of its search for the truth, usually provides the accused with the opportunity to establish his or her claim. In recognition of the seriousness with which the law regards the occurrence of juries being exposed to outside influences, the rules require a new trial in the event of such an occurrence. Rule 21.3 (f) & (g) Texas Rules of Appellate Procedure.

After careful review of the numerous juror affidavits, there can be no doubt that the chain of events as described in the original affidavit of W.W., attached to Defendant's original Motion For New Trial, did take place. A Christian Bible was brought into the jury room during jury deliberations on punishment. Prior to a final verdict on the special issues, the foreman read from this Bible certain, enumerated verse which was decidedly *not* inspirational but rather had to do with duty and responsibility for carrying out man's law (and this includes society's validation of the appropriateness of the death penalty). This reading took place at a time when the vote was *not* unanimous and the two dissenting jurors were identified for all concerned. Finally, following the reading, a *second* vote took place which was unanimous and which called for imposition of the death penalty.

It is for this trial court, and not the jurors, to determine whether this other evidence was adverse to Defendant Lucero

It is of no moment that the jurors did not believe that this Bible reading violated any principle of justice or any right of the Defendant or that it was utilized to bring prejudice against the Defendant. If this trial court determines that the Bible reading, which not one soul contends did not happen in the manner outlined in the original W.W. affidavit, constitutes evidence *not properly before the jury at trial*, then it cannot speculate on the probable effect of that evidence. *Alexander v. State,* 610 S.W.2d 750, 753 (Tex.Crim.App. 1980); *Rogers v. State*, 551 S.W.2d 369, 370 (Tex.Crim.App. 1977); *State v. Scott*, 819 S.W.2d 169, 170 (Tex.Crim.App.-Tyler, 1991, pet. ref'd.) The State's motion with accompanying affidavits asks this Court to do what authority specifically forbids - speculate on the probable effect of the Bible reading and base this decision on self-serving affidavits prepared in cookie-cutter fashion by the District Attorney's Office. The State concedes as much at page 19 of its brief.

II.

Why the evidentiary hearing is necessary

An evidentiary hearing is required in this case for several reasons.

1 - Opportunity to question jurors who refuse to talk with defense.

To begin, the State has now secured sworn affidavits from all twelve jurors who sat on Defendant's case, including four key jurors who previously had refused to talk with the defense. The State wishes to rely upon these affidavits to dispose of Defendant's claims *sans* hearing, including those jurors who have consciously chosen not to discuss this subject with the defense. As a result, the Defendant has been denied the opportunity to explore fully the circumstances of the Bible reading.

These self-serving affidavits raise more questions than they answer. Only through an evidentiary hearing where Defendant's counsel may put questions to the jurors in response to those matters raised in the affidavits can Defendant's adequately discharge his burden of making an adequate record for appellate review. And only through this evidentiary hearing can the this Court guarantee Defendant's constitutional right to due process.

2 - Foreman makes material, inconsistent statements to local TV station.

Moreover, it is now clear that the jury foreman has made statements which conflict with his sworn affidavit through his previous, extra-judicial comments made during an interview with a local television station on July 7, 2005. These interview statements are absolutely material to the analysis at

hand in that they strongly suggest that the foreman's decision to vote in favor of death came about as a direct result of having consulted Romans 13:1-6 *the night before punishment deliberations began* and that it was only after his personal epiphany that he decided to bring his personal Christian Bible into the jury room for a reading to the entire jury. The presence of the Bible in the jury room as well as his reading from the same was deliberate and planned and was not undertaken to emphasize the seriousness of the matter at hand as has been suggested in the foreman's affidavit. At present, the videotape and script which will corroborate the foreman's statements made to local television media are unavailable to the defense since representatives of the television station in question refuse to provide the subject videotape or script of the interview to defense counsel in the absence of a subpoena. Thus, there exists additional sources of evidence outside of the existing record necessary for determination of the issue raised within Defendant's motion for new trial and the only way to get to this source of evidence is to order an evidentiary hearing so that Defendant Lucero might avail himself of compulsory process in order to acquire this evidence.

3- This is truly a case of first impression.

Undersigned previously represented in his Memorandum of Law filed with the Court back on July 14, 2005 that there was no Texas case *directly on point* concerning Bible reading in the jury room during deliberations. Even in light of the two cases cited by the State which suggests otherwise,

undersigned sticks to his position - there really is no other case quite like this factual scenario. Fairness and the need to develop an adequate record for the Court of Criminal Appeals justifies an evidentiary hearing in the matter.

In *Martin v. State*, 400 S.W.2d 919 (Tex.Crim.App. 1966), the complaining witness in a rape case testified during examination before the jury to specific references in the Bible (Genesis 19:30-38) which she related directly to the defendant as "authority" for her sexual acts with him. These same verses were read by the jury from a different Bible than the one which the complaining witness referred during trial. The Bible references in question had been discussed and admitted into evidence during trial, thus forming part of the record of the case. This single fact clearly distinguishes *Martin* from the instant case.

In *Branch v. State*, 447 S.W.2d 932, 933 (Tex. Crim.App. 1969), the defendant claimed error because one of the jurors "quoted scripture from the Bible to the other jurors." The Court summarily disposed of the point of error by noting that the claim was not supported "by affidavit of one in position to know what transpired in the jury room during the deliberations of the jury." The issue left undecided in *Branch* thirty-six years ago is now decidedly pregnant given the affidavit of W.W. which established exactly what did transpire in the jury room during deliberations.

The time has come to address this serious issue head on and Defendant respectfully submits that only through an evidentiary hearing can the issue be resolved fully and fairly.

Appendix H

No. 48,593-C

THE STATE OF TEXAS	X	IN THE 251st DISTRICT COURT
VS.	X	IN AND FOR
JIMMIE URBAN LUCERO	X	POTTER COUNTY, TEXAS

DEFENDANT'S OBJECTIONS TO STATE'S JUROR AFFIDAVITS AND MOTION TO STRIKE SAME

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, JIMMIE URBAN LUCERO, Defendant herein, files this His Objections To State's Juror Affidavits and Motion To Strike Same and in support thereof would show the Court as follows:

I.

Defendant filed his Motion For New Trial on June 23, 2005. His Amended Motion For New Trial was filed on June 24, 2005. On June 30, 2005, the trial court corresponded with respective counsel and requested briefing on the issue of whether Defendant was entitled to an evidentiary hearing on his motion for new trial and what law, if any, existed on determination of what constituted an "outside influence" under the auspices of Rule 606(b) Texas

Rules of Evidence. (*see* Exhibit No. 1) In the letter, the trial court requested briefing on the issues to be completed no later than July 29, 2005 at which time the court would decide whether to set an evidentiary hearing on the motion.

Defendant filed his Memorandum of Law in response to the trial court's June 30th letter on July 14, 2005. Within the memorandum, Defendant again requested that the trial court grant and set an evidentiary hearing on the matters raised in the motions for new trial. The State filed its response to Defendant's motion for new trial on July 25, 2005. Attached to the State's response were affidavits signed by all twelve jurors who served on Defendant's trial. These affidavits all confirmed the fact that the jury foreman brought a Christian Bible into the jury room during deliberations at the punishment phase of Defendant's trial and read selected portions from that Bible to all other members of the jury. It is also undisputed that no part of the Bible was incorporated into the court's charge on punishment nor was the jury ever instructed by the trial court that it could consider any source of authority, including the Christian Bible, *other than the law as contained in the court's charge,* in answering the submitted special issues.

III.

On July 28, 2005, Defendant filed his Response to State's Answer and Brief with the trial court. Within this responsive pleading, Defendant again requested an evidentiary hearing on his

motions for new trial. In this memorandum of law, Defendant set forth proper standard of review when determining whether an outside influence was brought to bear on a juror. *See Rogers v. State*, 551 S.W.2d 369, (Tex.Crim.App. 1997); *State v. Scott,* 819 S.W.2d 169, 170 (Tex.Ct.App.-Tyler 1991, pet. ref'd.); *Molina v. State*, No. 07-00-0029-CR, (Amarillo Court of Appeals, January 21, 2003, not designated for publication). A bright line rule is in place: if it is established that there is no fact issue that the jury received other evidence and the evidence was adverse to the defendant, reversal is required. The courts will not speculate as to its *probable effect. Scott v. State,* 551 S.W.2d at 370.

The State argues competing theories; that is, that the introduction of the Christian Bible did not constitute an "outside influence" but even if it does, the reading of scripture during punishment deliberations amounts to nothing more than the reading of a dictionary or a secular book during deliberations. In support of both theories, the State has submitted the juror affidavits to show that the bible reading was harmless. Defendant pointed out in his response that all twelve affidavits attached to the State's answer addressed matters (bible reading and their interpretation of same) which occurred during their deliberations. Further, these affidavits also discussed why the biblical verses read by the foreman during jury deliberations did not cause "any juror's assent to or dissent from the verdict." As such, these affidavits run afoul of the prohibition against an attempt to impeach or sustain the validity of the jury's verdict. Rule 606(b).

Consideration of these juror affidavits is prohibited under either theory promoted by the State because it calls upon this court to speculate as to the probable effect of the scripture reading. The real task at hand is for this court to determine the context in which the bible reading occurred, the motivations of the jury foreman who set this chain of events into motion and whether the exact language contained in the particular version of biblical scripture was adverse to Defendant Lucero. Therefore, the contents of all twelve juror affidavits are not relevant to this court's duty at hand and, in fact, are inadmissible for that distinct reason.

IV.

As this court is aware, Defendant's Motion For New Trial and Amended Motion For New Trial are overruled as a matter of law on August 9, 2005. Defendant, as of the filing of this pleading, has received no word from the trial court whether it will set an evidentiary hearing on the motions. For this reason, Defendant herein lodges his formal objections to the juror affidavits attached to the State's Answer to Defendant's Motion For New Trial, moves to strike these affidavits from the record as absolutely prohibited by controlling law, requests that the court grant and set a hearing prior to or on August 9, 2005 in order to determine whether the bible reading was an "outside influence" and if so, whether it was adverse to Defendant Lucero and finally, to rule on Defendant's objections to the use

by the State of the juror affidavits and his request that same be stricken from the record.

Respectfully submitted,

WARREN L. CLARK
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/s/ Warren L. Clark
Attorney for Defendant
SBN 04300500

Appendix I

No. 48,593-C

THE STATE OF TEXAS	X	IN THE 251st DISTRICT COURT
VS.	X	IN AND FOR
JIMMIE URBAN LUCERO	X	POTTER COUNTY, TEXAS

DEFENDANT'S NOTICE OF APPEAL IN CRIMINAL CASE

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, JIMMIE URBANO LUCERO, Defendant in the above-styled and numbered cause, and submits this as notice of Defendant's intent to appeal from the judgment sentencing him to death in this case to the Court of Criminal Appeals in Austin, Texas.

Respectfully submitted,

WARREN L. CLARK
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806/379-7655

806/371-9610 (fax)

/s/ Warren L. Clark
Attorney for Defendant
SBN 04300500

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Notice of Appeal was provided to the office of the Potter County District Attorney on this the 12th day of August, 2005.

/s/ Warren L. Clark
Warren L. Clark

Appendix J

No. 48,593-C

THE STATE OF TEXAS	X	IN THE 251st DISTRICT COURT
VS.	X	IN AND FOR
JIMMIE URBAN LUCERO	X	POTTER COUNTY, TEXAS

AMENDED MOTION FOR NEW TRIAL

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, JIMMIE URBAN LUCERO, Defendant in the above-referenced and numbered cause, files this his Amended Motion for New Trial and in support thereof would show the Court as follows:

I.

After retiring to deliberate on the issue of punishment, the jury foreman conducted an initial straw vote on both of the statutorily mandated special issues which addressed the probability that Defendant would commit criminal acts of violence in the future so as to constitute a continuing threat to society (special issue number 1) and whether there existed sufficient mitigating circumstances to warrant that a sentence of life imprisonment rather

than a death sentence be imposed (special issue number 2). This initial vote revealed a majority of ten jurors who were prepared to vote "yes" to special issue number 1 and "no" to special issue number 2, thus necessitating the imposition of the death penalty. The remaining two jurors indicated their unwillingness to vote in such a way in which the death penalty would be imposed. At this juncture, the jury foreman produced his personal Bible and read to all members of the jury scripture from that Bible. This scripture addressed a Christian's duty to obey and consent to the laws of man. It also informed the listeners that those who opposed authority would experience condemnation.

The content of this scripture had the desired effect of coercing the two dissenting jurors to change their votes in order to insure a unanimous tally on both special issues. Thus, the receipt of the biblical scripture by the jury infringed on each individual juror's duty to base their verdict only on evidence received at trial. This receipt of other evidence was detrimental to Defendant's constitutional guarantee that the verdict at the punishment phase of the trial be truly unanimous, free from coercion and the product of the juror's individualized assessment of evidence lawfully admitted into during the punishment phase of the trial.

II.

Defendant requests an evidentiary hearing so that he may adduce facts not in the record relevant to the issue discussed under heading I.

III.

Application of Art. 37.071 Code of Criminal Procedure violates the 5th, 6th, 8th, and 14th Amendments to the U.S. Constitution and those principles underlying the United States Supreme Court decision in *Tennard v. Dretke*, 124 S.Ct. 2562 (2004) in that said law instructs the jury that it may not consider mitigating evidence which it does not find to be sufficiently connected to the crime to reduce moral blameworthiness. As such, said instructions unconsitutionally narrow the jury's discretion to factors concerning only moral blameworthiness.

WHEREFORE, PREMISES CONSIDERED, Defendant prays that upon hearing hereon, the Court grant this motion in its entirety and order a whole new trial on the merits.

Respectfully submitted,

WARREN L. CLARK
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/s/ Warren L. Clark
Attorney for Defendant
SBN 04300500

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion For New Trial was provided to the office of the Potter County D.A.'s Office on this the 24th day of June, 2005.

/s/ Warren L. Clark
Warren L. Clark

Appendix K

Constitutional Provisions Involved

U.S. Const. amend. VI

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. amend XIV, section 1

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its

jurisdiction the equal protection of the laws.